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09-833

No. _____

In The
Supreme Court of the United States

THOMAS P. LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA;
RONALD EDMONDS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The District Court granted summary judgment against Petitioner taxpayer, but omitted a damage award in its judgment. Respondent failed to timely try to amend the judgment or appeal, so it tried to add damages later as the correction of a clerical error under Rule 60(a), by introducing an IRS certificate of assessment as new evidence. The District Court agreed to add damages under Rule 60(a). Petitioner filed a "Notice of Appeal and Conditional Appeal." Petitioner's appeal asked the Circuit Court to rule that a damage award could not be added under Rule 60(a) and that Respondent was stuck with a judgment that awarded it nothing. In the event that the Circuit Court ruled against Petitioner and held that a damage award could be added, then Petitioner's conditional appeal asked the Circuit Court to reverse the grant of summary judgment. The Circuit Court did not address the appeal. Instead, the Circuit Court skipped the appeal and ruled in favor of Petitioner on his conditional appeal.

Petitioner now asks the Supreme Court to rule on the following four questions:

(1) If an appellant files an appeal regarding Issue #1 and a conditional appeal regarding Issue #2, asking the circuit court to address Issue #2 only if the circuit court first rules adversely on Issue #1, is the circuit court permitted to skip Issue #1 and address only Issue #2? (Petitioner thinks that the answer is no.)

(2) Can a judgment constitute a final decision when it omits a damage award but otherwise clearly

indicates the district court's intent to be a final decision? (Petitioner thinks that the answer is yes.)

(3) When a judgment omits a damage award, can the prevailing party file a Rule 60(a) motion to add damages and introduce new evidence? (Petitioner thinks that the answer is no.)

(4) For purposes of establishing damages under Rule 60(a) in a contested trust fund penalty case, is a certificate of assessment sufficient for the IRS to prove damages? (Petitioner thinks that the answer is no.)

LIST OF PARTIES

Petitioner is Thomas P. Lewis. Respondent is the United States. Ronald Edmonds is a Respondent whose interests are aligned with Petitioner in this Petition.

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OPINIONS BELOW

1. On 9/12/05, the district court filed its opinion granting summary judgment against both Petitioners in a trust fund penalty tax case. This opinion did not include any finding of fact about the amount of damages.

2. On 9/13/05, the district court filed its Judgment granting summary judgment against both Petitioners. This Judgment did not include any damage award.

3. On 2/5/07, the Sixth Circuit ordered a limited remand of the case to the District Court to determine damages and address whether it was too late to add a damage award.

4. On 4/17/07, the Magistrate filed his Report and Recommendation ("R&R"), recommending the granting of the United States' Rule 60(a) motion to add a damage award as the correction of a clerical error.

5. On 4/23/08, the District Court approved the R&R and filed an Order holding Lewis and Edmonds liable for damages in the amounts of $5,641,612.09 and $6,036,829.23, respectively, plus interest since 2/26/07. The Court also vacated a prior ruling that Rule 60(a) could not be used to add a damage award.

6. On 5/28/08, the District Court filed an Amended Judgment that included a damage award against Petitioner.

7. On July 13, 2009, the Sixth Circuit unanimously reversed the summary judgment, but never addressed the finality issues.

BASIS OF JURISDICTION

This action originated in the United States District Court for the Western District of Tennessee. The District Court granted summary judgment in favor of Respondent on 9/13/05. That first Judgment failed to include any damage award. On 5/28/08, the District Court filed an Amended Judgment permitting the Respondent to add a damage award as a Rule 60(a) correction of a clerical error.

On 6/10/08, Petitioner filed an Amended Notice of Appeal and Conditional Appeal, in which he asked the Circuit Court to first rule that the District Court lacked jurisdiction to add a damage award and that Respondent was stuck with the 9/13/05 Judgment that awarded it nothing (the appeal). If and only if the Circuit Court ruled against Petitioner on the appeal, Petitioner asked the Circuit Court to reverse the grant of summary judgment (the conditional appeal). On 7/13/09, the Sixth Circuit ruled in favor of Petitioner on the conditional appeal (reversing the District Court's grant of summary judgment against Petitioner) but never addressed the appeal. Even though this decision was pro-Petitioner, Petitioner asked the Sixth Circuit for a rehearing to address its appeal. On 9/22/09, the Sixth Circuit denied Petitioner's Petition for a Rehearing.

The Supreme Court has jurisdiction to review the 7/13/09 decision by the Sixth Circuit Court of Appeals under 28 U.S.C. §1254. This Petition is timely filed because Supreme Court Rule 13(3) permits Petitioner to file his Petition for Writ of Certiorari within 90 days after the Sixth Circuit's 9/22/09 denial of the petition for rehearing.

RELEVANT STATUTES AND RULES

1. 28 U.S.C. §1291: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

2. F.R.A.P. 3(a) provides that "An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4."

3. F.R.A.P. 3(c)(1)(B) provides that "The notice of appeal must . . . designate the judgment, order, or part thereof being appealed."

4. F.R.C.P. 60(a) provides that "The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record."

STATEMENT OF THE CASE

This case began as a trust fund penalty tax case with some unique features, but it has evolved into a vitally important multi-faceted civil procedure case worthy of attention at the highest level. The critical facts are as follows:

1. Petitioner Tom Lewis ("Lewis") was CEO of a public company, VisionAmerica, Inc. ("VisionAmerica"). Ron Edmonds ("Edmonds") was CFO of VisionAmerica. VisionAmerica failed to remit certain trust fund taxes, so the IRS assessed the trust

fund penalty tax against both Lewis and Edmonds. Both taxpayers vigorously contested the liability and continue to do so.

2. Petitioner Lewis made a trust fund penalty payment of $2,711.16 and filed a claim for refund. The IRS rejected the claim. Lewis, a resident of Memphis, Tennessee, filed a complaint in the Western District of Tennessee, suing for a refund. Jurisdiction was under 28 U.S.C. §1346(a)(1). Venue was under 28 U.S.C. §1391(e). The United States counterclaimed for the entire trust fund penalty tax and added Edmonds as a third-party defendant.

3. All parties moved for summary judgment. When the United States filed its motion for summary judgment, its *Statement of Undisputed Facts* did not offer any evidence substantiating the specific amounts of money allegedly due and owing.

4. On 9/12/05, the District Court issued its "ORDER GRANTING MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING CASE." (emphasis added) This was a 32-page opinion that purported to address all of the law and all of the facts. It held that both Lewis and Edmonds were responsible persons and that both had willfully failed to remit trust fund taxes to the Government. Its conclusion was crystal clear:

> "Based on the foregoing, the motion of the United States for summary judgment is GRANTED and the cross-motion of the Plaintiff is DENIED. Consequently, all remaining

pending motions in this matter are DENIED as moot and the pretrial conference and trial are to be removed from the Court calendar. The Clerk is hereby directed to enter judgment for the United States."

5. On 9/13/05, the Judge filed his Judgment in a Civil Case:

"**DECISION BY COURT.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that in accordance with the order Granting Motion For Summary Judgment Of The United States, Denying Plaintiff's Motion For Summary Judgment And Dismissing Case entered on September 12, 2005, this cause is hereby dismissed and judgment is entered for the Defendant, the United States Of America, and against the Plaintiff, Thomas P. Lewis and against the Third-Party Defendant, Ronald L. Edmonds."

6. Consistent with the Government's failure to provide sufficient evidence or even allegations in its *Statement of Undisputed Facts*, neither the 9/12/05 Order nor the 9/13/05 Judgment included any award of damages, or any finding of fact that would permit the calculation of the trust fund taxes owed, or even the date of assessment permitting the calculation of interest that accrued on the trust fund tax liability. In other words, the taxpayers lost but owed nothing.

7. On 9/22/05, Petitioner Lewis timely filed a Rule 59(e) motion for reconsideration, which the District Court rejected on 4/7/06.

8. Petitioner Lewis timely filed an appeal to the Sixth Circuit on 4/17/06. The United States did not file an appeal.

9. On 10/17/05, while the Petitioner's Motion for Reconsideration was pending and 34 days after the District Court's Judgment was filed, the United States filed an application to recover costs as a prevailing party. A hearing on this issue was conducted on 11/10/05 and the Clerk allowed costs to be assessed against the taxpayers. Lewis filed a Motion to Review Costs, asking the Court to reverse the taxation of costs. The District Court denied this Motion on 4/7/06.

10. On 12/19/05, also while Petitioner's Motion for Reconsideration was pending and 97 days after the District Court's Judgment was filed, the United States filed a motion to correct a clerical error. This motion acknowledged that the 9/13/05 Judgment did not include an award of damages and asked the Court to correct this "clerical error" by quantifying the damages. On 4/3/06, the Court denied the motion on the grounds that calculating damages is not a clerical chore.

11. After the 9/13/05 Judgment, the Government did not file a Rule 52(b) motion to add facts regarding the amount of damages. The Government did not file a Rule 59(e) motion to alter or amend the Judgment to add a damage award. The Government did not file a notice of appeal.

12. Again, on 4/3/06, the District Court denied Respondent's motion to add damages on the grounds that calculating damages is not a clerical chore, and on 4/7/06, the District Court denied Petitioner's motion to reconsider.

13. On 4/14/06, Petitioner filed a notice of appeal.

14. On 10/12/06, thirteen months after the District Court's dismissal of the case and six months after the taxpayers had filed their appeals, the United States filed a motion to dismiss the appeal on the jurisdictional ground that the District Court's judgment of dismissal was not an appealable final decision because the Judgment did not include an award of damages. Petitioner filed his brief opposing the motion.

15. On 2/5/07, the Sixth Circuit expressly did not rule on the finality issue, but remanded the case to the District Court to determine damages and address the finality issue:

> "Whether these appeals are premature will depend on whether the judgment entered for the government on September 13, 2005, was final for purposes of appeal. We are not inclined to rule on this issue until such time as the district court has determined the amounts claimed to be owed to the United States. Therefore, a limited remand is warranted. We express no opinion on the finality of the September 13 judgment and leave that issue to be considered, in the first instance, by the district court. If any party objects to the district

court's ruling on remand, a timely notice of appeal can be filed and the finality issue can be renewed in that party's briefing on the merits.

The motion to dismiss is DENIED without prejudice as set forth herein. This matter is remanded to the district court for the limited purpose of determining the amounts claimed to be owed to the United States. It is further ORDERED that any appeal taken from that determination be consolidated for briefing and submission with the present appeals. The district court is requested to forward a copy of its ruling to this court as part of the supplemental record on appeal."

16. On 2/28/07, the United States filed a Motion for Judgment in a Sum Certain, seeking to add a damage award against the taxpayers. The United States introduced new evidence to support its calculation of damages – a certificate of assessment showing what amounts the IRS had formally recorded as owed by the taxpayers. The motion was referred to a Magistrate for a report and recommendation. The motion did not indicate under what rule it was made. Nor did it address the finality issue.

17. On 4/17/07, the Magistrate filed his Report and Recommendation ("R&R"), treating the United States' Motion as a Rule 60(a) motion to correct a clerical error, and recommending that the motion be granted.

18. On 4/30/07, Petitioner Lewis filed his Objections to the R&R. The United States did not file any objections to the R&R, thereby accepting all of its

rulings, including the ruling that the United States' motion was a Rule 60(a) motion to correct a clerical error.

19. On 4/23/08, the District Court approved the R&R and filed an Order holding Lewis and Edmonds liable for damages in the amounts of $5,641,612.09 and $6,036,829.23, respectively, plus interest since 2/26/07. The Court also vacated its 4/3/06 ruling that Rule 60(a) could not be used to add a damage award.

20. On 5/28/08, the District Court filed an Amended Judgment that included a damage award against Petitioner.

21. Petitioner Lewis' first goal was to appeal the District Court's awarding of damages under Rule 60(a). If Lewis prevailed on this issue, then the Government would have won a judgment that awarded it nothing. Lewis would owe zero and there would be no trial or further activity of any kind. In the event Lewis' civil procedure argument failed, Lewis wanted a trial on the trust fund penalty tax issue. Thus, Lewis' second goal, contingent upon failure to achieve his first goal, was to appeal the District Court's grant of summary judgment.

Accordingly, on 6/10/08 Petitioner Lewis filed a "Notice of Appeal and Conditional Appeal" which stated the following:

> "1. Plaintiff Lewis appeals the Court's April 23, 2008 order that the Court's September 13, 2005 judgment be altered or amended under Rule 60(a) of the Federal Rules of Civil Procedure to add a

> damage award owed to the United States. Plaintiff disputes that the absence of a damage award in this case is correctable as a clerical error under Rule 60(a). Plaintiff Lewis also appeals the Amended Judgment in a Civil Case filed on May 28, 2008.
>
> 2. In the event the Sixth Circuit does not reverse or remand the Court's April 23, 2008 order and May 28, 2008 Amended Judgment as described above, Plaintiff Lewis conditionally appeals the Court's September 13, 2005 final judgment in favor of the United States holding him liable for the trust fund penalty tax."

Lewis' clearly-stated intention was to try to prevail on the civil procedure question, and if so, be done. Lewis asked the Court to review the trust fund penalty issues only if the Court first ruled against Lewis on the civil procedure question.

22. On 6/20/08, shortly after filing the Notice of Appeal and Conditional Appeal, Lewis filed a "Civil Appeal Statement of Parties and Issues," in which he again expressly distinguished between his appeal and his conditional appeal, in language virtually identical to his Notice of Appeal and Conditional Appeal.

23. Multiple briefs were filed by all parties. All parties understood that the civil procedure question was critical and all parties wrote extensively on the civil procedure issue. In fact, significantly more was written about the civil procedure question than the trust fund penalty issue.

24. At oral argument on June 17, 2009, all parties were prepared to address, and did address, the civil procedure issue. Counsel for Lewis devoted 100% of his time to the civil procedure question, discussing the conditional appeal issues only in response to questions from the Court. Similarly, the other lawyers devoted most of their time to the civil procedure question.

25. During oral argument, the Court asked whether it could avoid the civil procedure question by reversing the summary judgment and remanding the case back for trial. Such a reversal and remand would void the flawed judgment that omitted the damage award.

26. Petitioner Lewis responded by alerting the Court to the fact that his Notice of Appeal and Conditional Appeal had expressly bifurcated the appeal from the conditional appeal and that Lewis' intent was to not permit the Court to address the trust fund penalty issue unless the Court first ruled against Lewis on the civil procedure issue.

27. On July 13, 2009, the Court unanimously reversed the summary judgment. The Court never addressed the civil procedure issue, but explained in detail why the grant of summary judgment was in error. In other words, the Court resolved the conditional appeal without first resolving the appeal.

28. Actually the Court's Decision did refer to the civil procedure issue very briefly. In a nine-page decision, the Court noted in one phrase that the District Court "implicitly recognized that its September 12 judgment was not final by directing a

magistrate to conduct a hearing on the proper amount of damages." The Court then cited *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988), and *United States v. Reid*, 357 F.3d 574, 580 (6th Cir. 2004).

It is not clear whether the Court was intending to rule that the 9/13/05 Judgment was not a final decision. The Court never used language indicating that it was making a ruling. And it never addressed certain arguments made by Petitioner, strongly suggesting that the Court was not intending to rule on the civil procedure issues.

Furthermore, whether or not the 9/13/05 Judgment was a final decision depends upon the District Judge's discernible intent at the time of his 9/13/05 Judgment, not his second thoughts seven months later. Finally, *Christianson* and *Reid* permitted district courts to go back and correct prior non-final orders, not prior final decisions. Thus, neither case permits the District Court to go back and correct the 9/13/05 Judgment.

29. Though Lewis agreed that reversal of the summary judgment was a proper resolution of the conditional appeal, Lewis petitioned the Sixth Circuit for a rehearing to address his appeal first. In that petition, Lewis explained why he thought the Sixth Circuit was required to address his appeal before addressing his conditional appeal. Lewis' hope was that the Sixth Circuit would agree that the 9/13/05 was a final decision – that Petitioner lost but owed nothing – and that the case was over forever.

30. On 9/22/09, the Sixth Circuit denied Lewis's Petition for Rehearing.

REASONS FOR GRANTING THE PETITION

I Granting the Petition will enable the Court to (1) affect every case by instructing every appellant how it can frame its appeal by combining an appeal and a conditional appeal, (2) establish certain implications of the party presentation principle, a concept of increasing interest to the Court, (3) permit appellants the right to file protective appeals, and (4) restrain lower courts from exceeding their legal authority.

A. There is no case law directly on point.

Petitioner has not found any case that addresses the question whether an appellant can combine an appeal with a conditional appeal, requiring the circuit court to resolve one issue before looking at another issue.

B. There is closely-related case law – including recent Supreme Court decisions – that supports Petitioner.

1. The circuit court is not permitted to consider an issue not presented by the appellant.

The appellant controls the subject matter of the appeal and the circuit court lacks jurisdiction to address more than what the appellant designates. The statute creating appellate jurisdiction provides that "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. §1291. The jurisdiction

of the court of appeals is literally over "appeals," not over the final decisions.

The Court's jurisdiction over an appeal is based upon the timely filing of a notice of appeal. F.R.A.P. 3(a)(1). This requirement is jurisdictional. F.R.A.P. 3(c)(1)(B) requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." Thus, an appellant can narrow the scope of appeal by specifying exactly what he is appealing - and the court of appeals must honor the designation.

In *Elfman Motors, Inc. v. Chrysler Corporation*, 567 F.2d 1252 (3d Cir. 1977), the Third Circuit cited multiple cases standing for the proposition that the appellant controls the subject matter of the appeal and that the appeals court lacks jurisdiction to address more than what the appellant intended:

> "When an appeal is take from a specified judgment only or from a part of a specified judgment, the court of appeals acquires thereby no jurisdiction to review other judgments or portions thereof not so specified or otherwise fairly to be inferred from the notice as intended to be presented for review on the appeal." (567 F.2d at 1254)

The issue is the appellant's intent as discernible in the notice of appeal. Similarly, in *C.A. May Marine Supply Company v. Brunswick Corporation*, 649 F.2d 1049 (5th Cir. 1981), the Fifth Circuit approved the language in *Elfman* and held that the circuit court lacked jurisdiction to address issues beyond what the appellant had designated in its notice of appeal.

In *Drayton v. Jiffee Chemical Corporation*, 591 F.2d 352 (6th Cir. 1978), the plaintiffs were awarded damages for multiple losses, but not for all claimed losses. The plaintiffs' notice of appeal designated certain losses for appeal, but not all losses. The Sixth Circuit held that it lacked jurisdiction over all the losses not mentioned in the notice of appeal.

In *Beasley v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 751 F.2d 384 (6th Cir. 1984) [not recommended for full-text publication], the plaintiff filed two claims in his complaint. The trial court granted the defendant summary judgment on claim one. After a bench trial, the trial court ruled for the defendant on claim two. The plaintiff's notice of appeal mentioned only the second ruling. The Sixth Circuit held that the plaintiff's notice of appeal indicated an intent to appeal only claim two, so the court lacked jurisdiction over claim one.

In *Jordan v. Young*, 791 F.2d 933 (6th Cir. 1986) [not recommended for full-text publication], a prisoner filed two claims in a complaint against the warden. The warden's notice of appeal referred to only one issue, so the Sixth Circuit limited its review to that issue only.

In *United States v. Glover*, 242 F.3d 333 (6th Cir. 2001), the Sixth Circuit confirmed that "In Rule 3(c), Congress has limited this Court's appellate review to issues designated in the notice of appeal." (242 F.2d at 335) The Sixth Circuit observed that under Rule 3(c)(1)(B), "the decision what to appeal is left almost exclusively to the discretion of the appellant." (242 F.2d at 336-337)

The point of all these cases is that when an appellant clearly intends to limit the scope of appellate review, the court of appeals must honor that limitation. Petitioner clearly intended that the Sixth Circuit not look at his conditional appeal until it considered and ruled against him on his appeal.

2. The circuit court cannot improve an appellee's position without a cross-appeal by the appellee.

The "cross-appeal rule" provides that when an appellant appeals a judgment, the circuit court cannot worsen his judgment unless the appellee files a cross-appeal asking the court to worsen the judgment. The question that the Supreme Court has never definitively answered is whether the cross-appeal rule is a jurisdictional requirement (which would not be subject to exceptions) or is a rule of practice (which might be subject to exceptions on a case by case basis).

This issue is hot. In 1999 and again in 2008, the Supreme Court expressly did not answer the question. The Court ruled that even if the cross-appeal requirement is only a rule of practice, there are very few occasions where an exception would be permitted.

In *El Paso Natural Gas Company v. Neztsosie*, 526 U.S. 473 (1999), the defendants filed an appeal in a civil case. Though the plaintiff did not file an appeal, the Ninth Circuit took the initiative to make the prior judgment more favorable to the plaintiff. A unanimous Supreme Court reversed, holding that the circuit court was not permitted to improve the plaintiff's position when the plaintiff had not appealed. The Court expressly noted that it was not deciding whether the

cross-appeal rule was jurisdictional or simply a rule of practice. The Court held that even if it was only a rule of practice subject to exception, there was no compelling reason to make an exception.

Interestingly, the Government supported the defendants and argued that the cross-appeal rule was jurisdictional, so that the circuit court lacked the power to improve the plaintiff's result.

In *Greenlaw v. United States*, 128 S. Ct. 2559 (2008), a convicted criminal appealed his sentence as too long. The Government did not appeal, but there were clear sentencing guidelines and the sentence was actually and objectively too short. The trial court had made a clear error in favor of the defendant. Even though the Government did not appeal, the Eighth Circuit corrected the error and increased the sentence. The Supreme Court reversed, holding that the circuit court was not permitted to increase the sentence because the Government had not cross-appealed.

The Supreme Court acknowledged that it was not answering the question whether the cross-appeal rule was jurisdictional or just a rule of practice. It did not matter. The Supreme Court observed that it had never permitted an exception, and that the correction of a clear error was not enough to permit an exception.

Interestingly, in *Greenlaw*, the Government did not support the Eighth Circuit's decision in front of the Supreme Court. The Government's position was that the Eighth Circuit lacked jurisdiction.

As the Supreme Court observed in *Greenlaw*, multiple circuits have held that the cross-appeal rule

is jurisdictional, and multiple circuit courts have ruled that the cross-appeal rule is not jurisdictional, just a rule of practice.

The relevance of all this is that circuit courts are permitted to address only what appellants ask them to address in their notices of appeal. In effect, appellants instruct the court what to rule on, and the court is required to honor that instruction. This is the "party presentation principle."

In *Greenlaw*, the Supreme Court explained:

> "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to the courts the role of neutral arbiter of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a pro se litigant's rights. [case cited]. But as a general rule, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." [case cited]. As cogently explained:
>
> > "[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost

> always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us. [case cited].""

One logical implication of the party presentation principle is that an appellant ought to be able to combine a conditional appeal with an appeal and thereby require the circuit court to address the appeal first and perhaps only.

3. Petitioner's concept of a conditional appeal is the same as the long-approved concept of a protective appeal.

In *Anderson v. Roberson*, 2004 U.S. App. LEXIS 1817 (6th Cir. 2004) [not recommended for full-text publication], the Sixth Circuit discussed and approved the concept of a "protective cross-appeal," which is a form of conditional appeal.

> ""In a protective cross-appeal, a party who is generally pleased with the judgment and would have otherwise declined to appeal, will cross-appeal to insure that any errors against his interests are reviewed so that if the main appeal results in modification of the judgment his grievances will be determined as well." [citation omitted] . . . . Appellate courts generally allow protective cross-appeals but do not consider them unless it is appropriate to do so after disposition of the appeal. [citation omitted]

> Upon review, we conclude that we need not address the defendants' protective cross-appeal because the plaintiffs' appeal has been dismissed. The defendants' protective cross-appeal was dependent upon the plaintiffs' appeal such that the dismissal of the plaintiffs' appeal warrants dismissal of the defendants' cross-appeal."

As the Sixth Circuit explained, when the main appeal is resolved in favor of the cross-appellant, then the Sixth Circuit does not look at the protective cross-appeal. Accordingly, the Sixth Circuit would not address the cross-appeal first. Similarly, in Lewis' case, the Sixth Circuit should not have addressed the conditional appeal first. It should have first addressed the appeal, and if it resolved the appeal in favor of the taxpayers, it should have stopped and not have addressed the cross-appeal.

Note that if the district court had ruled against the United States on its motion to add a damage award, and if the United States had then appealed that decision, Lewis would have filed a protective appeal. That is, Lewis would have appealed the summary judgment only if the Sixth Circuit ruled against him on the final judgment issue, and the Sixth Circuit would have considered the final judgment issue first, and would have stopped if it resolved the final judgment issue in favor of Lewis. Why should the result be different when Lewis loses at the district court level and takes the initiative to appeal? There is no logical reason to disfavor Lewis under such circumstances, and no equitable reason.

C. The concept of a conditional appeal is fair.

If Lewis is not permitted to file an appeal and a conditional appeal, then he would have faced a dilemma: if he wished to guarantee that his appeal would be heard, then he would have had to have given up his conditional appeal and gamble entirely on the appeal. There is no good reason why Lewis, or any appellant, should have to make this choice. There is no good reason why the appellate process should insist upon dice-rolling gamesmanship.

If anything, in *Greenlaw*, the Supreme Court tried to reduce gamesmanship. One of the reasons justifying the cross-appeal rule is that when an appellant is deciding whether to appeal, he should not have to worry that an appellate court will worsen his position as a result of his appeal; he should only have to worry about what the government puts him on notice about in its cross-appeal.

D. The party presentation principle restricts the lower courts' authority to overreach and correct wrongs that they are not asked to correct.

Respondent made an error in this case that entitles the taxpayers to walk away without paying a penny. Even though Petitioner should owe zero anyway, this result could be perceived as an unjust windfall for the taxpayers. It is quite possible that the District Court and the Circuit Court were reluctant to permit such a windfall. Such an impulse is understandable but not permissible.

Respondent, the wealthiest and most powerful litigant in history, is fully capable of promoting its own

interests. Just as the circuit court should not have stepped in to sweeten the appellee's position in *Neztsosie*, and just as the circuit court should not have stepped in to improve the appellee's position in *Greenlaw*, and just as Justices Scalia and Thomas were concerned that the district court should not have stepped in to recharacterize a party's motion in *Castro v. United States*, 540 U.S. 374 (2003), and just as Justice Ginsburg wondered whether the district court should not have stepped in to apportion environmental liabilities when the parties were not proposing any sort of apportionment in *Burlington N. & Santa Fe Ry. Co.*, 129 S. Ct. 1870 (2009), it was not up to the courts to step in and protect Respondent from its own mistake.

II Granting the Petition will affect every case because it will provide much needed clarification of the definition of a final decision.

A. This is a hugely important question affecting every case.

A motion to add facts to a judgment must be made within 28 days after entry of a judgment. F.R.C.P. Rule 52(b). A motion to alter or amend a judgment must be made within 28 days after entry of a judgment. F.R.C.P. Rule 59(e). A notice of appeal must be made within 30 days after a judgment is entered. F.R.A.P. Rule 4(a)(1). Circuit courts have jurisdiction over an appeal from a final decision. 28 U.S.C. §1291. The definition of "final decision" affects the profoundest jurisdictional issues.

B. The current state of the law is confused and uncertain.

Respondent argued that the 9/13/05 Judgment was not a final decision because it failed to include a damage award. That this argument is still being made in 2009 indicates that the definition of "final decision" is not clear.

The evolution of Supreme Court decisions and rule-making has created some confusion.

In *United States v. Hark*, 320 U.S. 531 (1944), an opinion was rendered on Date One and a formal judgment was filed on Date Two. The Supreme Court held that the final decision was the judgment filed on Date Two. Regarding a final decision,

> "No form of words and no peculiar formal act is necessary to evince its rendition or to mature the right of appeal. . . . Where, as here, a formal judgment is signed by the judge, this is prima facie the decision or judgment rather than a statement in an opinion or a docket entry. . . . The judge . . . entered a formal order of record. We are unwilling to assume that he deemed this an empty form . . ." 320 U.S. at 534-535.

According to the Supreme Court, the issue was what the judge intended, and the presumption is that the judge intended a final decision when he filed a formal judgment.

The landmark case is *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958), in which a taxpayer won a refund claim. The district court

granted the taxpayer summary judgment on Date One in an opinion that did not include complete damage information. On Date Two, the district court filed a formal judgment that included complete damage information. The Court held that Date Two was the date of the final decision.

Schaefer does not require that a final decision must include a damage award. If it had, the decision would have been much shorter. The Court could have simply said that the Date One opinion was legally insufficient because it omitted critical information. But it didn't. Rather, it approvingly referred to *Hark* and the fact that no form of words is necessary to constitute a final decision (356 U.S. at 232), and then very succinctly stated that "While an opinion may embody a final decision, the question whether it does so depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion." The Court expressly explained that the lack of a damage award is "strong evidence" of a lack of intent to be done, but it is not the only factor. That is why the Court did not stop its analysis based on the lack of a damage award. Rather, it noted that a formal judgment was filed on Date Two, and that the formal judgment is prima facie the final decision under *Hark*. 356 U.S. at 235. In addition, the Court went on to examine the actions of all concerned – the judge, the clerk, and each party – to determine that no one thought Date One was the final decision. 356 U.S. at 235-236.

Schaefer does include dicta, that, read out of context, suggest that the absence of a damage award means that a judgment cannot legally constitute a final decision. That is, the Court wrote that "it is obvious that a final judgment for money must, at least,

determine, or specify the means for determining, the amount." 356 U.S. at 233. It is clear from the context that the Court meant that a properly drafted final decision would include a damage award, but the Respondent in this case and other parties in other cases have relied upon this dicta to argue that a decision cannot be final if it lacks a damage award. See *Fiataruolo v. United States*, 8 F.3d 930 (2nd Cir. 1993); *McDermitt v. United States*, 954 F.2d 1245 (6th Cir. 1992). As the Second and Sixth Circuits held, these parties have misread *Schaefer*, whose precise holding is that a decision is clearly final when (i) it includes a damage award, (ii) it is embodied in a separate document that is signed by the judge as a formal judgment, and (iii) all relevant parties treated it as the final decision. The Court did not hold that any one of these factors were alone sufficient or necessary to determine the final decision. Rather, all of the factors reflect intent and all of the factors need to be examined and weighed.

Interestingly, the taxpayer in *Schaefer* argued that the Date One opinion was the final decision because the missing information had been admitted by the Government in its answer. In Petitioner's case, the Government made the same argument – that discovery produced enough information to provide the amount of damages. Petitioner denies this statement as a matter of fact, but more importantly, the Supreme Court rejected this argument legally:

> "This argument cannot be accepted under the facts here for the reason that Rule 79(a) expressly requires that the clerk's entry "shall show . . . the substance of [the] judgment of the court. . . ." Surely the amount of the judgment

> for money is a vital part of its substance. To hold that one must search the whole record to determine the amount, or the facts necessary to compute the amount, of a final judgment for money would be to ignore the quoted provision of Rule 79(a)." 356 U.S. at 234-235.

The Supreme Court in *Schaefer* also observed that "there is no statute or rule that specifies the essential elements of a final judgment." 356 U.S. at 233.

Five years later, Rule 58 was amended to require that "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." According to the Advisory Committee that drafted this amendment,

> "Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., 'the plaintiff's motion [for summary judgment] is granted,' see *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 229... (1958). Clerks on occasion have viewed these memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of a judgment was effective, starting the time running for post verdict motions and for the purpose of appeal ... The

> amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document distinct from any opinion or memorandum which provides the basis for entry of judgment."

Note that the Advisory Committee did not observe that the absence of all essential elements of a judgment prevents a judgment from being a final decision. Note further that the Advisory Committee stated that the separate document rule "eliminated these uncertainties." No matter what deficiencies might exist in the judgment, the filing of a separate document is prima facie evidence of the judge's intent to be done.

In *United States v. Indrelunas*, 411 U.S. 216 (1973), the Supreme Court confirmed that the purpose of the 1963 amendment to Rule 58 was to remove uncertainty when a final decision has been made. The Court went on to hold that the rule was to applied mechanically "to make certain when a judgment becomes effective." 411 U.S. at 220-221.

However, in *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978), the Court held that the separate document rule could be waived by the parties. Since the purpose of the separate document rule is to give the parties certainty about the date of judgment, the parties could waive the separate document rule when it is clear from their conduct that they accepted the same date of judgment as the date of the final decision. The parties would not be required to go back to the district court, get a signed judgment, and then start over with appeals. "The Federal Rules of Civil Procedure are to be "construed to secure the just, speedy, and

inexpensive determination of every action." 435 U.S. at 386-387.

So a separate judgment is not absolutely necessary, but when it exists is it conclusive? Apparently not, because the Supreme Court further explained in *Bankers Trust* that "Even if a separate judgment is filed, the courts of appeals must still determine whether the district court intended the judgment to represent the final decision in the case." 435 U.S. at 385. In that case, the district court filed an opinion that expressly dismissed the plaintiff's case but did not file a separate judgment. The district court filed an opinion and order concluding "Complaint dismissed in its entirety. So ORDERED." On the same day, the clerk then made an entry to the same effect on the court's docket. The plaintiff appealed without objection and both parties proceeded as if the opinion was a final decision. The Supreme Court held that the district court clearly evidenced its intent to make a final decision and that the parties effectively waived the separate judgment rule.

Bankers Trust was superseded by the 2002 amendments to Rule 58 that provided that a judgment is deemed entered on the earlier of the date it is in fact entered on a separate document or 150 days after the date it is simply entered on the docket. Thus, an opinion that appears to be a final decision becomes a judgment 150 days after entry on the docket. The Advisory Committee on the 2002 amendments explained:

> "Rule 58 has provided that a judgment is effective only when set forth on a separate document and entered as provided in Rule

> 79(a). This simple separate document requirement has been ignored in many cases. The result of failure to enter judgment on a separate document is that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins to run. The time to appeal under Appellate Rule 4(a) also does not begin to run. There have been few visible problems with respect to Rule 50, 52, 54(d)(2)(B), 59, or 60 motions, but there have been many and horridly confused problems under Appellate Rule 4(a). These amendments are designed to work in conjunction with Appellate Rule 4(a) to ensure that appeal time does not linger on indefinitely, and to maintain the integration of the time periods set for Rules 50, 52, 54(d)(2)(B), 59, and 60 with Appellate Rule 4(a)."

The circuit courts – including cases involving the trust fund penalty tax – have repeatedly held that a judgment that fails to provide for damages can still be a final decision, despite efforts to interpret *Schaefer* as requiring a damage award. *Fiataruolo v. United States*, 8 F.3d 930 (2nd Cir. 1993); *McDermitt v. United States*, 954 F.2d 1245 (6th Cir. 1992).

C. Petitioner's case presents the issue in clear terms.

In Petitioner's case, the objective indicia of the District Court's intent when it filed its 9/13/05 Judgment include the following:

(1) The Judgment expressly stated that the case was dismissed. Perhaps the single most compelling

evidence of intent is the presence or absence of a reference to dismissal.

(2) The 9/12/05 Order could not have been stronger. Not only did it expressly dismiss the case, it expressly deemed all pending motions as moot, it canceled the pre-trial conference, and it removed the trial from the court docket.

(3) Just like the case in *Fiataruolo*, the Judge wrote a comprehensive 32-page opinion addressing all arguments before him.

(4) Just like the case in *Fiataruolo*, the Court confirmed its initial decision months later when rejecting Lewis's Rule 59(e) motion to reconsider.

(5) The District Court Clerk understood the finality of the Judgment, as evidenced by the docketed case caption that warns in capitalized bold print:

"WARNING: CASE CLOSED on 09/12/2005."

(6) Respondent clearly understood the finality of the 9/13/05 Judgment when it applied for costs as the prevailing party just one month later. The Clerk clearly understood the finality of the 9/13/05 Judgment when it approved those costs to Respondent as the prevailing party. The Court clearly confirmed the finality of the 9/13/05 Judgment when it affirmed those costs to Respondent as the prevailing party.

(7) Respondent understood the finality of the 9/13/05 Judgment when, 97 days later, it filed a Rule 60(a) motion to correct a clerical error – a motion not

subject to the post-final decision deadlines of other remedial motions.

(8) The issue of finality was not raised by Respondent until more than one year after the 9/13/05 Judgment, after Lewis and Edmonds had already filed lengthy appellate briefs.

III Granting the Petition will enable the Court to clarify that the omission of a damage award is not a clerical error that can be corrected by making a Rule 60(a) motion and introducing new evidence.

A. The Question.

Rule 60(a) provides "The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." A Rule 60(a) motion is not subject to a timing deadline. The question is whether Rule 60(a) can be used when more evidence must be added to the record to correct a mistake.

Respondent argued that evidence outside the record could be considered in a Rule 60(a) motion if the fact being established is objectively certain and undeniable.

Petitioner's position is that a Rule 60(a) motion cannot rely on new evidence, that the correction of an error under Rule 60(a) is not about a new round of adjudication.

The Supreme Court has not ruled on this.

B. The circuit courts generally support Petitioner, but there is one Tenth Circuit decision that Respondent tried to rely upon that suggests that evidence outside the record can be used.

The Sixth Circuit has repeatedly held that a Rule 60(a) motion cannot be based on new evidence outside of the record. *In re Walter*, 282 F.3d 434 (6th Cir. 2002); *Olle v. The Henry & Wright Corporation*, 910 F.2d 357 (6th Cir. 1990); *Hirsch v. Commissioner*, 186 F.2d 524 (6th Cir. 1951).

In *Hirsch*, the taxpayer won a tax refund suit in district court. The Government filed a Rule 60(a) motion and filed a new exhibit – a certified transcript of account – showing that the taxpayer had not paid as much taxes as the taxpayer had claimed, thereby requiring a reduction in the refund amount. The District Court granted the motion but the Sixth Circuit reversed. Rule 60(a) was not available because "we are dealing with something other than clerical mistakes. We are confronted with the clear adjudication upon consideration of new evidence . . .." Regardless of how strong the new evidence was that a mistake had been made, Rule 60(a) was not appropriate.

The same result followed forty years later, in *Olle*. Though an error was clear and not disputed – based upon new evidence that had not been part of the record – the Sixth Circuit reaffirmed that the error was not a clerical error and could not be corrected by Rule 60(a).

Respondent argued, and the District Court agreed, that a Rule 60(a) motion could be based upon facts outside the record if the facts are readily ascertainable and undisputed. They relied upon *Semtner v. Group*

Health Service of Oklahoma, Inc., 129 F.3d 1390 (10th Cir. 1997). Respondent and the District Court misinterpreted *Semtner*, which at most held that a fact outside the record might be used in a Rule 60(a) motion if the parties agree that the fact is correct. Otherwise, the fact would require the judge to adjudicate new facts, and correcting clerical errors is not about adjudicating new facts.

IV Granting the Petition will enable the Court to clarify that the presumption of correctness generally accorded to IRS assessments (1) does not apply when the IRS has superior access to the relevant tax information, (2) is not sufficient to correct an error under Rule 60(a), and (3) is not sufficient to clothe an otherwise naked assessment.

A. The Question.

To prove damages for purposes of its Rule 60(a) motion, Respondent argued, and the District Court agreed, that the IRS's certificate of assessment was enough.

Petitioner's position is that the presumption of correctness is not always created by an IRS assessment, and that even when the presumption is created, its effect is to break a tie at trial, not to relieve the government of the need to establish a foundation for its tax claim.

The Supreme Court has not addressed these nuances.

B. The presumption of correctness should not apply when the IRS has more access and control over the relevant information than the taxpayer.

The presumption of correctness should not apply in Petitioner's case because the public policy underlying the presumption – as explained by the Third Circuit in *Psaty v. United States*, 442 F.2d 1154 (3rd Cir. 1971) – would not be served. The presumption of correctness is designed to place the burden of proof on the party who has access to and controls the relevant information – typically the taxpayer. But in this case, Lewis and Edmonds had no access or control over the information. The Government did. So the rule should not apply against Lewis and Edmonds.

C. The presumption of correctness should not be sufficient to justify a clerical correction under Rule 60(a).

It is a non-sequitur to use the presumption of correctness to establish a fact as certain enough to constitute a correction to a clerical error under Rule 60(a). The presumption of correctness breaks a tie at trial. Its purpose is to assign the burden of proof to the taxpayer at trial. The presumption in no way establishes a fact as so obvious and certain that a court can later characterize the failure to find the fact as clerical error in a post-trial 60(a) motion.

D. A certificate of assessment should not be sufficient to establish liability in a case where liability is disputed.

A certificate of assessment may be sufficient in collection cases where the taxpayer does not contest the amount of his liability, but that does not mean that a certificate of assessment is sufficient when the taxpayer does contest the fact and amount of liability.

A certificate of assessment is no more persuasive than if the IRS said "The taxpayers owe $X because we say they owe $X."

In *United States v. Janis*, 428 U.S. 433 (1976), the Supreme Court has already ruled that "naked assessments" without sufficient foundation are not entitled to any presumption of correctness. This was followed by the Sixth Circuit in *Coleman v. United States*, 704 F.2d 326 (6th Cir. 1983).

In Petitioner's case, the Government is relying upon an IRS print-out. Without evidence of the critical underlying facts, the print-out evidences nothing more than a naked assessment.

Respectfully submitted,

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 06-5957, 06-5959, 08-5721, 08-5724, 08-5725, 08-5726

[Filed July 13, 2009]

THOMAS P. LEWIS	)
	)
Plaintiff-Appellant	)
	)
v.	)
	)
UNITED STATES OF AMERICA (Internal Revenue Service)	)
	)
Defendant/Third-Party Plaintiff - Appellee	)
	)
v.	)
	)
RONALD EDMONDS	)
	)
Third-Party Defendant	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

BEFORE: CLAY and ROGERS, Circuit Judges, and JORDAN, District Judge.*

ROGERS, Circuit Judge. When withheld employee income taxes were not turned over to the Government as required by law, the Internal Revenue Service went against two corporate officers for the deficient amounts. This is permitted by the Internal Revenue Code, if the officers were responsible for turning over the withheld sums and willfully failed to do so. The district court—in a series of orders that present some appellate jurisdiction questions in this court—granted the Government summary judgment. Because there are genuine issues of material fact regarding required elements of liability for both officers, reversal of the summary judgment is required.

VisionAmerica was a publicly traded health care company in the field of eye care. Shortly before its demise, it failed to make its payroll tax payments. Employers such as VisionAmerica are required to deduct payroll taxes from their employees' wages and pay them to the Government on behalf of the employees. *See* 26 U.S.C. § 3102. The withheld taxes are held in trust for the United States until paid. *See id.* § 7501. While the money belongs to the United States, the employer retains control for a time.

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* The Honorable R. Leon Jordan, Senior District Judge of the Eastern District of Tennessee, sitting by designation.

The money of course may not be used to shore up the finances of an enterprise that is at risk. The Internal Revenue Code accordingly imposes direct liability on any "person required to collect, truthfully account for, [or] payover" such taxes if the person "willfully fails" to fulfill these duties. 26 U.S.C. § 6672; *see Slodov v. United States*, 436 U.S. 238, 246-50 (1978). The law imposes personal liability on such corporate officers so long as they are "under a duty" to pay the wrongfully diverted taxes. 26 U.S.C. § 6671.

VisionAmerica failed to pay required payroll taxes from the fourth quarter of 1998 through the first quarter of 2000. VisionAmerica subsequently went bankrupt, and the Government did not receive about four million dollars owed in taxes. The Government sought to hold the corporate officers in this case personally liable because they had been under a duty to pay the corporate payroll taxes and had willfully failed to pay them. During the relevant period, Tom Lewis was CEO of VisionAmerica, and Ron Edmonds was CFO. Lewis and Edmonds claim that they cannot be held liable.

Edmonds's theory of the case is that he was not under a duty to pay the payroll taxes because VisionAmerica's board of directors had relieved him of the responsibility to pay the payroll taxes. In the aftermath of an unrelated accounting problem, the board lost at least some confidence in Edmonds and reorganized the financial affairs of the company. The board installed Todd Smith to work with Edmonds. The parties dispute whether Edmonds or Smith had the responsibility to direct funds to pay the IRS rather than other creditors, but Edmonds concedes that if he

had the responsibility to pay the taxes, his failure to do so was willful.

Lewis argues that he lacked both the authority to pay the taxes and the willfulness necessary to establish personal liability. In Lewis's view, despite his apparent control of the company, in practice the board of directors strictly curtailed his ability to influence the financial affairs of the company. Moreover, Lewis claims that he had no actual knowledge that VisionAmerica had not paid the payroll taxes, and thus cannot be liable for willfully diverting funds to other creditors.

The Government contested both taxpayers' versions of the facts, and the district court granted it summary judgment on the issue of liability. After canvassing the evidence, the district court reasoned that the evidence, "aside from Edmonds' self-serving assertions to the contrary," showed that Edmonds "continued to exert control over the Company's major financial decisions" during the relevant period. The district court concluded that Lewis bore responsibility for the failure to pay the taxes due to his considerable authority over VisionAmerica's affairs. The court further discounted Lewis's "self-serving contentions," and based on the testimony of other witnesses concluded that Lewis's failure to pay the taxes was willful because "it is obvious" that other VisionAmerica employees had specifically warned Lewis that payroll taxes had gone unpaid. On September 12, 2005, the court granted summary judgment to the Government against both taxpayers and directed the clerk of the district court to enter judgment for the Government.

However, the "judgment" that the court entered did not specify the amount of damages that the court awarded to the Government on its claims. The Government did not timely move to correct this error under Fed. R. Civ. P. 59(e), but did file a motion about three months later to amend the judgment under Rule 60(a). The district court rejected that motion because the omitted damages amount was not a clerical error within the scope of Rule 60(a), but the court implicitly recognized that its September 12 judgment was not final by directing a magistrate to conduct a hearing on the proper amount of damages. *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988); *United States v. Reid*, 357 F.3d 574, 580 (6th Cir. 2004).

Nevertheless, Lewis and Edmonds each subsequently filed a notice of appeal from the September 12 judgment. The Government moved to dismiss the appeal as taken from a nonfinal judgment, and we remanded so that the district court could calculate the amount of damages. The district court did so, and Lewis and Edmonds each filed a notice of appeal from the subsequent order that specified the amount of damages awarded to the United States. These notices of appeal were premature because the district court had not yet entered judgment in accordance with this order, but the notices of appeal nonetheless became effective when the district court later entered final judgment. *See* Fed. R. App. P. 4(a)(2). The district court subsequently entered an amended judgment setting forth the amounts awarded from Lewis and Edmonds along with dates to permit calculation of interest. Edmonds and Lewis then each filed additional notices of appeal, so that the

consolidated appeals of Edmonds and Lewis bear six appellate docket numbers.

Summary judgment in this case was not warranted because, under the familiar summary judgment standard, viewing the submitted evidence in a light most favorable to Lewis and Edmonds, there are genuine issues of material fact with respect to each of them.

First, Edmonds shows that disputes remain about material facts that bear on his liability. He testified that at the relevant time, Smith was responsible for deciding "what was paid and what wasn't paid." Edmonds testified that after the board of directors reorganized the financial affairs of the company, Edmonds continued to work on resolving VisionAmerica's earlier underpayments that had occurred on Edmonds's watch, but that Smith was in charge of making ongoing payroll tax payments. Multiple employees testified that after the reorganization, accounting staff reported to Smith, not Edmonds. If, as he claims, Edmonds was not "one who has authority to direct payment of creditors," then he cannot be held liable. *See Gephart v. United States*, 818 F.2d 469, 473 (6th Cir. 1987) (quotations omitted).

Smith did testify that Edmonds bore primary responsibility for the payroll taxes at the relevant time, and that Edmonds still had considerable authority to prioritize payments. But for summary judgment purposes we must assume that when Smith's and Edmonds's stories diverge, the factfinder may accept Edmonds's version.

The Government argues that Edmonds admitted his responsibility for the payroll tax deficiencies on an IRS Form 4180. But these admissions appear to relate only to responsibility for taxes before the disputed period, taxes that have been paid. While a jury might believe the Government's theory that the document contains Edmonds' admissions of responsibility through December 8, 1999, a jury might also believe Edmonds's assertion that he only referred to the tax problems that had developed through the time of the reorganization. The document does not unambiguously resolve the question of which interpretation is correct. Edmonds testified that he was not responsible for the continued nonpayment of taxes during the contested period because the board of directors had relieved him of his responsibilities at that point. Crediting his testimony, as the law requires at the summary judgment stage, means that sufficient facts are in dispute to warrant a trial under familiar summary judgment practice.

But, the Government claims, the normal rules of summary judgment somehow do not apply to tax cases, and "the uncorroborated oral testimony of the taxpayer is insufficient as a matter of law to overcome summary judgment." The cases that the Government cites do not, however, support such a position. *Liddy v. Comm'r of Internal Revenue*, 808 F.2d 312 (4th Cir. 1986), was an appeal from a bench trial in the Tax Court, and did not address summary judgment standards at all. The case dealt with the burden of production at trial when a taxpayer had destroyed corroborating evidence, *see id.* at 315, and it is of no help to the Government. Our unpublished decision in *Williams v. United States*, Nos. 93-5965, 93-5966, 1995 WL21431 (6th Cir. Jan. 19, 1995), likewise does not

support the Government's position.[1] Thus, genuine issues of material fact regarding liability preclude summary judgment against Edmonds.

Lewis likewise presents genuine issues of material fact sufficient to preclude summary judgment against him. Factual disputes remain both on whether Lewis had authority to pay the payroll taxes and on whether he willfully failed to pay them.

Lewis testified that, as CEO, he "spent most of my time on managing day-to-day field operations and pursuing new development opportunities for the company." He also "spent a fair amount of time in shareholder relations, and . . . any special projects that would have been directed to me by the board of directors." On the other hand, "financial policy was ultimately directed by the board of directors." Lewis

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[1] In *Williams*, we upheld a grant of summary judgment to the Government in a tax case, but the case did not involve the question of whether the taxpayer's evidence had shown a genuine issue of material fact. The case concerned whether the Government's evidence was legally sufficient to support the assessment when the taxpayer had conceded liability but offered a "mere general denial of correctness" of the assessed amount of the tax. *See id.* at *4. The taxpayer argued that the evidence supporting the Government's assessment was insufficient, but "failed to offer any evidence to rebut" the assessment, and failed to "produce any records" documenting the correct amount of his liability. *See id.* at *2. Summary judgment was appropriate because the taxpayer had the burden to prove the Government's assessment wrong, but failed to offer anything to meet that burden. *See id.* at *4. While Edmonds likewise bears the burden to prove the Government's assessment wrong, he has offered evidence in the form of his own testimony that if believed would show that he is not one who may be found liable.

was not on the audit committee, which consisted of outside directors and the chairman of the board. Edmonds, as CFO, reported to the board of directors. Lewis testified that in practice he did not sign checks without Edmonds's approval. He testified that "stewardship over the monetary assets to the company" was with Edmonds. Moreover, he testified that the board of directors rejected his recommendation that it terminate Edmonds as CFO; instead it retained Edmonds but installed Smith in the reorganized accounting department.

Lewis presented enough disputed evidence to permit a conclusion that he did not have a "duty" to pay the payroll taxes. Under his version of the evidence, the board of directors had assigned oversight over financial operations to Edmonds, directly supervised Edmonds, and showed that it did not follow Lewis's recommendations about the financial department. A factfinder could infer that the board would not have supported Lewis had he attempted to override Edmonds's decisions about which creditors to pay. A corporate title alone, even that of CEO, is not enough to establish liability under the statute; the "practical reality" of the corporation matters. *See O'Connor v. United States*, 956 F.2d 48, 51-52 (4th Cir. 1992). The required "functional" test requires a "factual inquiry" into Lewis's precise role. *See Gephart*, 818 F.2d at 473. Since Lewis and the Government have each offered evidence in support of conflicting versions of the facts, a factfinder will have to conduct that inquiry.

Likewise, Lewis presented enough evidence about whether he willfully failed to pay the payroll taxes that a factfinder must address that question. Lewis

testified that he first learned of VisionAmerica's payroll tax delinquency in mid-March of 2000, and that the board of directors almost immediately removed his authority to influence the problem. To fail willfully to pay the payroll taxes, Lewis would have to have known that the taxes were delinquent. *See Gephart*, 818 F.2d at 475. Negligence alone would not establish liability; at a minimum, reckless conduct would be required. *See Calderone v. United States*, 799 F.2d 254, 259-60 (6th Cir. 1986).

The Government did not present uncontested evidence sufficient to find that Lewis acted willfully. It points to a meeting in November 1999, but uncontested facts show at most that Lewis, Edmonds, and others discussed the fact that VisionAmerica had an ongoing dispute with the IRS, but not that the dispute concerned unpaid payroll taxes. Likewise, undisputed facts show at most that Lewis had knowledge that the IRS had levied some of the company's bank accounts, but not that Lewis knew that the levies were for payroll taxes rather than, as Lewis claims Edmonds told him, IRS errors concerning the relationship between VisionAmerica and its subsidiaries.

Because genuine issues of material fact remain regarding Lewis's authority to prioritize payments to creditors and regarding his knowledge of the payroll tax deficiency during the relevant period, Lewis must be allowed to make his case to a factfinder.

Viewing the evidence, including each taxpayer's own testimony, in a light most favorable to each taxpayer shows that the Government did not establish that it was entitled to summary judgment against

either taxpayer. We therefore reverse the summary judgment entered by the district court and remand for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

CASE NO: 02-2958-B

[Filed May 28, 2008]

THOMAS P. LEWIS,	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
Defendant / Third-Party Plaintiff,	)
	)
v.	)
	)
RONALD L. EDMONDS,	)
Third-Party Defendant.	)
	)

DECISION BY THE COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that in accordance with the Court's order overruling the objections to the magistrate judge's report and recommendation recommending that the Judgement entered on September 13, 2005 be altered or amended,

the Plaintiff, Thomas P. Lewis, shall owe the United States $5,641,612.09, as of February 26, 2007, plus additional interest and statutory additions accruing from that date, for the trust fund recovery penalties for the tax periods ending June 30, 1999, September 30, 1999, December 30, 1999, and March 31, 2000. The Third-Party Defendant, Ronald L. Edmonds shall owe the United States $6,036,829.23, as of February 26, 2007, plus additional interest and statutory additions accruing from that date, for the trust fund recovery penalties for the tax periods ending June 30, 1999, September 30, 1999, December 31, 1999, and March 31, 2000. All other claims which were asserted in this case are dismissed.

APPROVED:

s/ J. Daniel Breen
J. DANIEL BREEN, UNITED STATES DISTRICT JUDGE

May 28, 2008
Date

THOMAS M. GOULD, CLERK OF COURT

By: s/ T. Elchlepp
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

No. 02-2958 B

[Filed April 23, 2008]

THOMAS P. LEWIS,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Defendant/Third-Party Plaintiff,	)
	)
v.	)
	)
RONALD L. EDMONDS,	)
	)
Third-Party Defendant.	)
	)

ORDER ON OBJECTIONS TO REPORT AND RECOMMENDATION AND APPEAL OF MAGISTRATE JUDGE'S ORDER DENYING MOTION TO STRIKE

In a report and recommendation entered April 17, 2007, the magistrate judge recommended that the judgment entered in this matter on September 13, 2005 be altered or amended in accordance with Rule 60(a) of the Federal Rules of Civil Procedure to reflect amounts owed to the United States. Separate objections to the report and recommendation were filed on behalf of the Plaintiff, Thomas P. Lewis, and the Third-Party Defendant, Ronald L. Edmonds, to which the Government has responded. Also before the Court is the appeal by Edmonds to the magistrate judge's order, also entered April 17, 2007, denying his motion to strike exhibits to the motion for judgment in a sum certain.

In ruling on objections to a report and recommendation, the Court is required to make a de novo review upon the record of those portions of the magistrate judge's report and recommendation to which objections have been made. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); Fenner v. Berghuis, No. 1:03-CV162, 2006 WL 374171, at *1 (W.D. Mich. Feb. 17, 2006), mot. to certify app. denied, 2006 WL 753119 (W.D. Mich. Feb. 17, 2006). Under such a review, the district judge may accept, reject, or modify any of the magistrate judge's findings and recommendations. 28 U.S.C. § 636(b)(1); United States v. Raddatz, 447 U.S. 667, 673-74, 680, 100 S. Ct. 2406, 2411-12, 2415, 65 L. Ed. 2d 424 (1980), reh'g denied, 448 U.S. 916, 101 S. Ct. 36, 65 L. Ed. 2d 1179 (1980); Victoria's Secret Stores v. Artco Eq. Co., Inc., 194 F. Supp. 2d 704, 715 (S.D. Ohio 2002). With respect to Edmonds' appeal of the magistrate judge's order, pursuant to Rule 72 of the Federal Rules of Civil Procedure, upon the filing of objections, the district court judge is to "consider such objections and . . .

modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed 746 (1948), reh'g denied, 333 U.S. 869, 68 S. Ct. 788, 92 L. Ed. 1147 (1948).

The instant action was brought by Lewis pursuant to the Internal Revenue Code seeking recovery for $2,711.16, plus interest, paid to the Government for employment tax liabilities and penalties assessed against him. The Government denied liability and filed a counterclaim for trust fund penalty assessments in the amount of $4,211,466.27, plus penalties, interest and statutory additions, arising from Lewis's failure to pay employee payroll taxes owed by VisionAmerica, of which he was chief executive officer and president. The Government later filed a third-party complaint against Edmonds, VisionAmerica's chief financial officer and executive vice president. In an order entered September 12, 2005, this Court granted the Government's motion for summary judgment against Lewis and Edmonds. The Court did not include in its judgment an award of money damages to the Government. On December 19, 2005, the Government moved to amend the judgment pursuant to Rule 60(a) of the Federal Rules of Civil Procedure in order to reflect the amounts owed by the Plaintiffs, which according to its calculations totalled $5,078,797.08 for Lewis and $5,433,008.16 for Edmonds. In an order entered April 7, 2006, the undersigned referred the matter to the magistrate

judge for a hearing and report and recommendation on the amounts owed. In April 2006, both Plaintiffs filed timely notices of appeal to the Sixth Circuit Court of Appeals. In an opinion dated February 7, 2007, the Sixth Circuit remanded the matter to this Court for the limited purpose of determining the amount owed the United States. On February 28, 2007, the Government again sought judgment, this time in the amounts of $5,641,612.09 against Lewis and $6,036,829.23 as to Edmonds. This motion was also referred to the magistrate judge. Attached as an exhibit to the motion was the Declaration of Gary A. Longley, a revenue officer advisor for the Internal Revenue Service ("IRS") in Nashville, Tennessee, assigned to assist in the collection of the tax liability at issue in this case, to which was appended IRS account transcripts reflecting itemized amounts owed by Lewis and Edmonds as of February 26, 2007. Attached to the motion was also a proposed amended judgment indicating the dollar amounts sought by the Government. On March 16, 2007, Edmonds filed a motion to strike the account transcripts as well as the proposed judgment, also referred to the magistrate judge. The magistrate judge recommended that the judgment be altered or amended to reflect that the Plaintiffs owed the amounts sought by the Government and denied the motion to strike.

> Fed. R. Civ. P. 60(a) provides in pertinent part that
>
> [c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on

> the motion of any party and after such notice, if any, as the court orders.

As the Sixth Circuit articulated in In re Walter, 282 F.3d 434 (6th Cir.), cert. denied sub nom. Giannetti v. Pruzinsky, 537 U.S. 885, 123 S.Ct. 118, 154 L.Ed.2d 144 (2002),

> [t]he basic purpose of the rule is to authorize the court to correct errors that are mechanical in nature that arise from oversight or omission. Clerical mistakes include those made by judges as well as ministerial employees. The rule does not, however, authorize the court to revisit its legal analysis or otherwise correct an error of substantive judgment. . . . Stated differently, a court properly acts under Rule 60(a) when it is necessary to correct mistakes or oversights that cause the judgment to fail to reflect what was intended at the time of trial. In that regard, when a court has undertaken to make the judgment or record speak the truth rather than something other than what was originally pronounced the court has not abused its discretion in granting relief under Rule 60(a).

In re Walter, 282 F.3d at 440-41 (internal citations and quotation marks omitted). In ruling on a Rule 60(a) motion, the district court is afforded "very wide latitude." Hart v. Lutz, 102 F.App'x 10, 12 (6th Cir. 2004). Where the amount of damages is "readily ascertainable and undisputed," the omission of the specific amount to be awarded from the judgment constitutes a "clerical error" which may be corrected under Rule 60(a). Semtner v. Group Health Serv. of Okla., Inc., 129 F.3d 1390, 1392 (10th Cir. 1997).

"A certificate of assessments and payments is presumptively correct and establishes prima facie proof of tax liability." United States v. Hillman, 60 F.App'x 563, 564 (6th Cir. 2003) (citing United States v. Walton, 909 F.2d 915, 918-19 (6th Cir. 1990)); see also United States v. Fior D'Italia, Inc., 536 U.S. 238, 242, 122 S. Ct. 2117, 2122, 153 L. Ed. 2d 280 (2002) ("It is well established in the tax law that an assessment is entitled to a legal presumption of correctness - a presumption that can help the Government prove its case against a taxpayer in court."). Assessments are "generally regarded as being sufficient proof, in the absence of evidence to the contrary, of the adequacy and propriety of notices and assessments that have been made." United States v. Am. Scrap Tire Recycles, Inc., No. 1:07 CV 0156, 2008 WL 1696927, at *5 (N.D. Ohio Apr. 9, 2008) (citation omitted). Courts have held that transcripts of account "provide[] at least presumptive evidence that a tax has been validly assessed . . ., unless irregularities are evident that raise a question as to [its] accuracy . . ." Hovind v. C.I.R., No. 11894-05L, 2006 WL 1867340, at *5 (U.S. Tax Ct. July 6, 2006), aff'd, 228 F.App'x 966 (11th Cir. 2007); see also Sepulveda v. United States, No. CV-F-03-6854 OWW/SMS, 2007 WL 677210, at * 2-6 (E.D. Cal. Mar. 1, 2007) (summary judgment granted in favor of the government where plaintiff failed to rebut presumption created by electronically generated IRS account transcript). "An assessment will not be entitled to such presumption . . . if it is determined to be a naked assessment[, that is,] one made without any foundation whatsoever, or without some predicate supporting evidence." Ferguson v. United States, 484 F.3d 1068, 1077 (8th Cir. 2007) (internal citations and quotation marks omitted).

The burden falls on the taxpayer to produce convincing evidence that the presumption should not apply. Hillman, 60 F.App'x at 564 (citing Walton, 909 F.2d at 918-19). "The burden on the taxpayer is not merely a burden of producing evidence; it is a burden of persuasion by the preponderance of the evidence that the assessment is not correct. Only if that is shown must the government show what the correct assessment is." United States v. Houck, No. C-1-01-541, 2004 WL 2649533, at *2 (S.D. Ohio Oct. 5, 2004) (quoting Sinder v. United States, 655 F.2d 729, 731 (6th Cir. 1981)). "If a taxpayer does not present evidence indicating to the contrary, the court may properly rely on the forms and conclude that valid assessments were made." Id. (quoting Guthrie v. Sawyer, 970 F.2d 733, 737-38 (10th Cir. 1992)). It was the conclusion of the magistrate judge that, as the Plaintiffs failed to challenge the Government's calculations as inaccurate, the amounts owed were in fact "readily ascertainable and undisputed" and, therefore, that the judgment should be amended to reflect an award of the amounts claimed pursuant to Rule 60(a).

In this case, although the Plaintiffs have taken strident exception to the amounts sought by the Government, they have failed to show that the account transcripts, which enjoy at least some presumption of correctness, are in error. Therefore, the objections of the Plaintiffs to the report and recommendation are overruled. The Court ADOPTS the recommendation of the magistrate judge, GRANTS the Government's motion to alter or amend, and DIRECTS the Clerk of

Court to enter the proposed amended judgment.[1] Furthermore, for the reasons articulated herein with respect to the report and recommendation, the magistrate judge's order denying Plaintiff Edmonds' motion to strike is AFFIRMED.[2]

IT IS SO ORDERED this 23rd day of April, 2008.

s/ J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE

---

[1] As to the Court's holding in its April 7, 2006 order that Rule 60(a) did not apply to the issues before it herein, the decision is hereby VACATED to that extent.

[2] Edmonds' basis for his appeal of the order denying his motion to strike the proposed amended judgment and the account transcripts was the same proffered in support of his objection to the report and recommendation. Therefore, a separate discussion is not necessary.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

No. 02-2958-B/An

[Filed April 17, 2007]

THOMAS P. LEWIS,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Defendant/Third-Party Plaintiff,	)
	)
v.	)
	)
RONALD E. EDMONDS,	)
	)
Third-Party Defendant.	)
	)

REPORT & RECOMMENDATION

Before the Court is the Government's Motion for Judgment in a Sum Certain (D.E. # 192). United State District Judge J. Daniel Breen referred the matter to the Magistrate Judge for determination and/or report and recommendation. For the reasons set forth below, the Court finds that the amounts claimed to be owed the United States are readily ascertainable and undisputed, and it is recommended that the Judgment be altered or amended pursuant to Fed. R. Civ. P. 60(a) to reflect amounts owed the United States.

BACKGROUND

This case involved a trust fund penalty assessed against Plaintiff Thomas P. Lewis ("Lewis"), who partially paid the penalty and then filed a Complaint for the refund. The District Court concluded that Lewis and Third-Party Defendant Ronald L. Edmonds ("Edmonds") were responsible persons and that they had failed to pay employee payroll taxes owed by VisionAmerica, a company where both men served as officers. Therefore, the Court granted the United States' Motion for Summary Judgment against Lewis and Edmonds (D.E. # 133) and entered its Judgment (D.E. # 134). However, the Judgment did not include an award of monetary damages for the taxes, penalties and interest owed. As a result, the Government filed a Motion to Alter or Amend Judgment arguing that the omission of the monetary award was a clerical error under Fed. R. Civ. P. 60(a) and that the amounts owed the Government were "readily ascertainable and undisputed." The Court disagreed that the amounts owed were readily ascertainable and undisputed and in its Order (D.E.# 156) of April 7, 2006 referred "the matter to the magistrate judge for a hearing and

report and recommendation on the amounts claimed to be owed to the United States."[1]

Before the Magistrate Judge could conduct a hearing, Lewis and Edmonds filed a timely notice of appeal (D.E. # 159) on April 20, 2006, to the Sixth Circuit to challenge the Court's decision in favor of the Government. The Magistrate Judge then ordered that the hearing on amounts claimed to be owed the United States be held in abeyance pending the appeal (D.E. # 161). Subsequently, on February 7, 2007, the Sixth Circuit remanded "for the limited purpose of determining the amounts claimed to be owed to the United States" (D.E. # 187). The Sixth Circuit's Order also stated, "we express no opinion on the finality of the September 13 judgment and leave that issue to be considered, in the first instance, by the district court."

Now the Government has filed a Motion for Judgment in a Sum Certain to determine the amount of damages owed by Lewis and Edmonds. In support of its Motion, the Government attached a "transcript of account" to demonstrate that Lewis is indebted to the United States in the total amount of $5,641,612.09, as of February 26, 2007, plus additional interest and statutory additions accruing from that date. The transcript of account also shows that Edmonds is indebted to the United States in the total amount of $6,0360,829.23, as of February 26, 2007, plus additional interest and statutory additions accruing

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[1] The Court notes that although the Order was captioned as an "Order Denying the Motion," the District Court only referred the question of damages to the Magistrate Judge, and nowhere in the body of Order did the District Court deny the Motion to Alter or Amend pursuant to Rule 60(a).

from that date. The Government included the Declaration of Gary A. Longley, a revenue officer advisor with the Internal Revenue Service. Mr. Longley avers that he is assigned to this case and has reviewed the transcripts of account against Lewis and Edmonds and that the amounts shown in the transcripts accurately reflect the respective amounts owed by Lewis and Edmonds. In its prayer for relief, the Government requested "that the Court order the Clerk to enter judgment in favor of the United States and against Thomas Lewis and Ronald Edmonds to reflect amounts owed by Thomas P. Lewis and Ronald L. Edmonds to the United States."

In separate responses in opposition to the Government's Motion, Lewis and Edmonds argue that the Government is not entitled to any monetary damages. This is because the Court's Judgment on September 13, 2005, did not include an award of damages and was a final decision. Lewis contends that the Government "rested its case without offering any relevant evidence of damages" which resulted in the Court not awarding the Government any monetary damages. According to Lewis and Edmonds, the Government then failed to correct the Judgment in the proper way when it failed to file a Rule 52(b) Motion to amend or make additional factual findings, or to file a Rule 59(e) Motion to alter or amend the judgment, or to appeal the Court's decision not to alter or amend the Judgment pursuant to Rule 60(a). Lewis further claims that the Government's Motion "has completely ignored the finality issue" in spite of the Sixth Circuit's instruction. In the alternative, Lewis and Edmonds contend that the Government has failed to adequately substantiate its "naked assessment," and so the Government's assessment is not entitled to the

presumption of correctness. Finally, Lewis questions the reliability of the transcript of account supplied by the Government and its perceived flaws and inconsistencies. Therefore, Lewis and Edmonds argue that the Court should deny the Government any recovery.

The Government has filed a Reply in which it dismisses Lewis' and Edmonds's arguments that it is not entitled to any recovery at all. The Government explains that the transcripts of account show different amounts over time due to the addition of more interest and statutory penalties. Furthermore, the Government contends that the assessment for Edmonds was made one year prior to the assessment for Lewis and that in that interval the IRS changed its method and began assessing penalties for each quarter rather than in one lump sum. Thus, the transcripts of account are reliable and accurately reflect the activity in each person's account.

ANALYSIS

As an initial matter, the Court notes that prior to the appeal, the District Court referred the matter of damages to this Court "for a hearing and report and recommendation on the amounts claimed to be owed to the United States" as part of its consideration of the Government's Motion to Alter or Amend the Judgment (D.E. # 156).[2] The Court also observes that the Government has not briefed the issue of finality of the Judgment, nor has the Government cited the specific procedural rule under which it seeks the relief stated

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[2] *See* note 1, *supra*.

in the instant Motion, namely the entry of a judgment with specific awards of damages against Lewis and Edmonds. Therefore, the Court will treat the instant Motion as one made pursuant to Rule 60(a).

The Government has produced an assessment, which was sworn to by the IRS agent assigned to this case, stating the amounts owed by Lewis and Edmonds. Lewis and Edmonds have responded that the Government is entitled to nothing because the District Court's Judgment awarded it nothing, or in the alternative that the proffered assessment is not entitled to the presumption of correctness. Otherwise Lewis and Edmonds do not challenge the assessment as inaccurate.

In a refund case such as the one at bar, the Service's assessment is presumed to be correct.[3] In light of this presumption, the taxpayer has the burden to prove that the assessment is somehow erroneous.[4] There is an exception to this presumption of correctness where the Service's assessment is "naked." In other words, the taxpayer must show that there is no admissible evidence available to support the Service's assessment.[5] Furthermore, federal courts have recognized that certified "transcripts of account" are admissible to establish the presumption of

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[3] *U.S. v. Hillman*, 60 Fed.Appx. 563, 564, (6th Cir. 2003); *Lorenzini v. U.S.*, 1991 WL 203086, *2 (6th Cir. 1991).

[4] *Lorenzini*, 1991 WL 203086, *2; *Collins v. U.S.*, 848 F.2d 740, 742 (6th Cir. 1988).

[5] *Cook v. U.S.*, 46 Fed.Cl. 110, 113 (Fed.Cl. 2000).

correctness in favor of the Service.[6] One circuit has gone so far as to hold that certified transcripts of account are self-authenticating.[7]

The Court finds that the amounts claimed to be owed to the United States are readily ascertainable and have not been disputed. Therefore, the amounts claimed to be owed should be awarded pursuant to Rule 60(a) and the judgment amended. The Court finds that the certified transcripts of account submitted by the Government accurately reflect amounts owed by Lewis and Edmonds. It appears to the Court that the transcripts of account attached as exhibits to the Government's Motion are entitled to the presumption of correctness as accurate assessments against Lewis and Edmonds. Therefore, the burden to overcome this presumption shifts to Lewis and Edmonds. However, in this case the taxpayers have failed to show that the assessments are somehow erroneous or otherwise "naked." There appears to be admissible evidence to support the Service's assessment, and the taxpayers have failed to carry their burden to show that the transcripts were unreliable or erroneous in some particular. While the taxpayers have raised unanswered questions about the interpretation of the transcripts, Lewis and Edmonds have not seriously challenged the amounts claimed to be owed to the United States in any other respect except to argue that the District Court entered a Final Judgment without awarding any amount to the

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[6] *Lindsay v. C.I.R.*, 56 Fed.Appx. 800, 801 (9th Cir. 2003); *Hovind v. C.I.R.*, 2006 WL 1867340, *5 (U.S.Tax Ct. 2006).

[7] *U.S. v. Thurner*, 21 Fed.Appx. 477, 478-479 (7th Cir. 2001).

Government. Thus, the Court finds that the transcripts of account correctly reflect amounts owed by Lewis and Edmonds to the United States.

Therefore, the Court recommends that the Judgment be altered or amended to reflect that Lewis owes the United States $5,641,612.09, as of February 26, 2007, plus additional interest and statutory additions accruing from that date, for the trust fund recovery penalties for the tax periods ending June 30, 1999, September 30, 1999, December 31, 1999, and March 31, 2000. The Court also recommends that the Judgment be altered or amended to reflect that Edmonds owes the United States $6,036,829.23, as of February 26, 2007, plus additional interest and statutory additions accruing from that date, for the trust fund recovery penalties for the tax periods ending June 30, 1999, September 30, 1999, December 31, 1999, and March 31, 2000.

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS FROM THE DATE OF SERVICE OF THE REPORT. FAILURE TO FILE THEM WITHIN TEN (10) DAYS OF SERVICE MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES MAGISTRATE JUDGE

Date: April 16th, 2007.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 06-5957/5959

[Filed February 5, 2007]

THOMAS P. LEWIS	)
	)
Plaintiff-Appellant (06-5957),	)
	)
v.	)
	)
UNITED STATES OF AMERICA (Internal Revenue Service),	)
	)
Defendant/Third-Party Plaintiff - Appellee,	)
	)
v.	)
	)
RONALD EDMONDS,	)
	)
Third-Party Defendant-Appellant (06-5959).	)

ORDER

Before: SUKRHEINRICH, SUTTON, and McKEAGUE, Circuit Judges.

The plaintiff, Thomas Lewis, and the third party defendant, Ronald Edmonds, appeal the judgment for the United States in this tax dispute. The United States (hereafter "the government") moves to dismiss the appeals as premature. Lewis and Edmonds have filed responses in opposition and the United States has filed a reply.

We note, as an initial matter, that on April 7, 2006, prior to the filing of these appeals, the district court entered an order ruling on a motion filed by the government to alter or amend the judgment pursuant to Fed. R. Civ. P. 60(a). The order, among other things, "refer[red] the matter to the magistrate judge for a hearing and report and recommendation on the amounts claimed to be owed to the United States." The present appeals were filed and on May 3, 2006, the district court entered an order directing that "the hearing and report and recommendation shall be held in abeyance until receipt of the ruling on the appeals from the United States Court of Appeals."

Whether these appeals are premature will depend on whether the judgment entered for the government on September 13, 2005, was final for purposes of appeal. We are not inclined to rule on this issue until such time as the district court has determined the amounts claimed to be owed to the United States. Therefore, a limited remand is warranted. We express no opinion on the finality of the September 13 judgment and leave that issue to be considered, in the first instance, by the district court. If any party objects to the district court's ruling on remand, a timely notice of appeal can be filed and the finality issue can be renewed in that party's briefing on the merits.

The motion to dismiss is **DENIED** without prejudice as set forth herein. This matter is remanded to the district court for the limited purpose of determining the amounts claimed to be owed to the United States. It is further **ORDERED** that any appeal taken from that determination be consolidated for briefing and submission with the present appeals. The district court is requested to forward a copy of its ruling to this court as part of the supplemental record on appeal.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green jb
Clerk

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By /s/ J. Brock
Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CASE NO: 2:02-2958-B

[Filed September 13, 2005]

THOMAS P. LEWIS,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Defendant/Third-Party Plaintiff,	)
	)
v.	)
	)
RONALD EDMONDS,	)
	)
Third-Party Defendant.	)
	)

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that in accordance with the Order Granting Motion For Summary Judgment Of The United States, Denying Plaintiff's Motion For Summary Judgment And Dismissing Case entered on September 12, 2005, this cause is hereby dismissed and judgment is entered for the Defendant, the United States Of America, and against the Plaintiff, Thomas P. Lewis and against the Third-Party Defendant, Ronald L. Edmonds.

APPROVED:

/s/
J. DANIEL BREEN
UNITED STATES DISTRICT COURT

9/13/05
Date

THOMAS M. GOULD
Clerk of Court

/s/ Judy Easley
(By) Deputy Clerk

This document entered on the docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 9/13/05

[Notice of Distribution Omitted in Printing of this Appendix]

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

No. 02-2958 B

[Filed September 12, 2005]

THOMAS P. LEWIS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant/Third-Party Plaintiff,

v.

RONALD L. EDMONDS

Third-Party Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING CASE

INTRODUCTION AND BACKGROUND

This action was brought by the Plaintiff, Thomas P. Lewis, on December 13, 2002 against the United States of America (the "USA" or the "Government"), pursuant to the Internal Revenue Code, seeking recovery of $2,711.16, plus interest, paid to the USA for employment tax liabilities and penalties assessed against him. The USA denied liability and, on February 6, 2003, filed a counterclaim against Lewis for trust fund penalty assessments in the amount of $4,211,466.27, plus penalties, interest and statutory additions. According to the Government, Lewis was the chief executive officer (CEO), president and a board member of VisionAmerica, Inc. ("VisionAmerica" or "the Company"), a healthcare entity which provided laser eye surgery through doctor's offices owned and managed by the Company. In 1995, the USA alleges that VisionAmerica began to have difficulties in paying employment taxes to the government on a timely basis. It is claimed that the problems worsened until the unpaid tax liabilities reached crisis levels in late 1998 through early 2000, eventually leading to the Company's bankruptcy and liquidation. It has been alleged by the Government that during this period VisionAmerica failed to turn over in excess of $5.5 million in employment taxes. On or about February 12, 2002, the Internal Revenue Service (the "IRS") also assessed against Ronald L. Edmonds, the Company's chief financial officer (CFO), executive vice president and a board member, trust fund recovery penalties related to employment taxes owed by VisionAmerica. A year later, the Government filed a third-party complaint against Edmonds to reduce those penalty assessments to judgment. Before the Court is the USA's motion for summary judgment, pursuant to

Rule 56 of the Federal Rules of Civil Procedure, as to the third-party complaint against Edmonds and the counterclaim against Lewis. Also before the Court is the cross-motion for summary judgment filed by the Plaintiff.[1]

STANDARD OF REVIEW

Rule 56(c) provides that a

> . . .judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c); see Celotex Corn. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc., 862 F.2d 597, 601 (6th Cir. 1988). In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co.. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

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[1] The USA correctly points out that the cross-motion was filed after the dispositive motion deadline had passed. However, if the Court were to grant the USA's request to deny the cross-motion as untimely, it must also deny the USA's motion, filed a month after the motion deadline, for the same reason. Even though both motions for summary judgment were untimely filed, the Court will nonetheless address the merits thereof, as the trial of this matter is imminent.

When the motion is supported by documentary proof such as depositions and affidavits, the nonmoving party may not rest on his pleadings but, rather, must present some "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324, 106 S.Ct. at 2553. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., 475 U.S. at 586, 106 S.Ct. at 1356. These facts must be more than a scintilla of evidence and must meet the standard of whether a reasonable juror could find by a preponderance of the evidence that the nonmoving party is entitled to a verdict. Anderson v. Liberty Lobby, Inc., 477 US. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). The "judge may not make credibility determinations or weigh the evidence." Adams v. Metiva, 3 1 F.3d 375, 379 (6th Cir. 1994).

APPLICABLE LAW

> The [Internal Revenue] Code requires most employers to withhold Social Security, Medicare, and federal income taxes from their employees' wages. [T]he withheld money is held in trust for the United States until paid to the Treasury on a quarterly basis. The withholding taxes are part of the wages of the employee, held by the employer in trust for the government; the employer, as a function of administrative convenience, extracts money from a worker's paycheck and briefly holds that money before forwarding it to the IRS. A delinquency in trust fund taxes thus is not simply a matter between the IRS and an employer, but rather involves employee wages. The significant responsibility of... [an] employer

> is summed up by then Judge Cardozo's famous statement that "a trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

Bell v. United States, 355 F.3d 387, 392 (6th Cir. 2004) (internal citations and quotation marks omitted). "The 'trust fund taxes' are for the exclusive use of the Government and are not to be used to pay the employer's business expenses, including salaries, or for any other purpose." Gephart v. United States, 818 F.2d 469, 472 (6th Cir. 1987). "It is no excuse that, as a matter of sound business judgment, the money was paid to suppliers and for wages in order to keep the corporation operating as a going concern -- the government cannot be made an unwilling partner in a floundering business." Kinnie v. United States, 994 F.2d 279, 283 (6th Cir. 1993) (citation omitted).

The penalty established by Congress for an employer's failure to comply with its obligations is a harsh one. Title 26 U.S.C. § 6672(a) provides in pertinent part that

> [a]ny person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

The "person" referred to in the statute "is *personally* liable for 100% of the delinquent taxes." Bell, 355 F.3d at 392 (emphasis in original).

> The statute's punitive nature comes not from an increased monetary penalty, as the responsible party is not liable for an amount that is higher than the delinquent tax balance, but rather from personal, as opposed to corporate, liability. Section 6672 thus exists "to protect the government against losses by providing it with another source from which to collect the withheld taxes."

Id. at 392-93 (citing Gephart, 818 F.2d at 473).

Liability under *5* 6672 is to be imposed in the event an individual meets two requirements. First, he must be a "responsible person" under the statute and, second, he must have willfully failed to turn the tax amount over to the government. Id. at 393; Kinnie, 994 F.2d at 283; McDermitt v. United States, 954 F.2d 1245, 1250 (6th Cir. 1992); Gephart, 818 F.2d at 473. "To obtain are fund of a previously paid assessment, a responsible person has the burden of showing that the assessment is inaccurate, because he has placed at issue an assessment which is presumed correct. This burden entails proving, by a preponderance of the evidence, that he was not a responsible person who willfully failed to pay over the withheld taxes." Bell, 355 F.3d at 393 (internal citations and quotation marks omitted). Therefore, Lewis and Edmonds have "to demonstrate that a genuine issue of material fact exists regarding [their] responsibility for the taxes and [their] willful failure to pay them in order to show" that summary judgment is not appropriate. See id.

As to the first element, the "test for determining the responsibility of a person under § 6672 is essentially a functional one, focusing upon the degree of influence and control which the person exercised over the financial affairs of the corporation and, specifically, disbursements of funds and the priority of payments to creditors." Gephart, 818 F.2d at 473; see also Bell, 355 F.3d at 393 (citing Gephart). The term "person" as used in the Internal Revenue Code "includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. § 6671 (b). Facts to be considered in determining whether an individual is a "responsible person" include

> (1) the duties of the officer as outlined by the corporate by-laws; (2) the ability of the individual to sign checks of the corporation; (3) the identity of the officers, directors, and shareholders of the corporation; (4) the identity of the individuals who hired and fired employees; (5) the identity of the individuals who were in control of the financial affairs of the corporation.

Gephart, 818 F.2d at 473. No one factor is dispositive. "The crucial examination is whether a person had the 'effective power to pay taxes.'" McMillan v. United States, Nos. 93-1338, 93-2245, 1995 WL 7977, at *2 (6th Cir. Jan. 9, 1995) (citing McDermitt, 954 F.2d at 1252).

More than one person can be a responsible officer of a corporation. Essentially,

> liability is predicated upon the existence of significant, as opposed to absolute, control of the corporation's finances. It is basically a factual inquiry. Generally, such a person is one with ultimate authority over expenditure of funds since such a person can fairly be said to be responsible for the corporation's failure to pay over its taxes, or more explicitly, one who has authority to direct payment of creditors.

Gephart, 818 F.2d at 473 (internal citations and quotation marks omitted)

> With respect to the second element--willfulness--the Sixth Circuit has instructed that
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> [u]nder our basic definition of willfulness, a responsible person who makes a deliberate choice to voluntarily, consciously, and intentionally pay other creditors rather than make tax payments is liable for willful failure. The responsible party need not exhibit an intent to defraud the IRS or some other evil motive; all that is necessary to demonstrate willfulness is the existence of an intentional act to pay other creditors before the federal government.

Bell, 355 F.3d at 393 (internal citations and quotation marks omitted) (citing Collins v. United States, 848 F.2d 740, 742 (6th Cir. 1988)). A showing of willfulness "requires either actual knowledge or a reckless disregard of 'facts and known risks that the taxes were not being paid.'" United States v. Valleau, No. 97-2313, 1998 WL 939840, at *2 (6th Cir. Dec. 21, 1998) (citing Calderone v. United States, 799 F.2d 254, 259-60 (6th

Cir.1986)). "[P]roof of a responsible person's knowledge of payments to other creditors" and "awareness of the failure to pay the trust fund taxes" is sufficient to trigger liability. Bell, 355 F.3d at 393. In Bell, the Sixth Circuit noted that this is true even if the "responsible person" is a "sympathetic figure." The court cited to Collins, in which it found that "even though the plaintiff was a sympathetic figure, who relied on another's promise to pay off the taxes, he still acted willfully because he knew that the taxes were not being paid and he diverted funds, which could have been used to offset the tax debt, to cover other business expenses." Id. at 393-94 (citing Collins, 848 F.2d at 742) (internal quotation marks omitted). Bell also made reference to Gephart, holding that "a corporate general manager willfully failed to pay the trust fund taxes, even though the manager might have been fired for disobeying his superior's orders not to pay the taxes, because the manager was aware of an unpaid tax debt yet continued to disburse funds to other creditors." Id. at 394 (citing Gephart, 818 F.2d at 475). Furthermore, the court noted in Bell that "a responsible individual is willful if he fails to use all *unencumbered funds* that come into his possession thereafter to pay the delinquent taxes." Id. (citations and internal quotation marks omitted) (emphasis in original).

FACTS, POSITIONS OF THE PARTIES AND ANALYSIS

The gravamen of the USA's position in this case is that Lewis and Edmonds were both officers of VisionAmerica and, thus, "responsible persons" for purposes of the statute and that they, in such capacities, failed to pay the employee payroll taxes.

Not surprisingly, both Lewis and Edmonds seek to lay responsibility squarely--and exclusively--at the feet of the other. Clearly, however, the responsible person is not limited to one person in a company. Rather, there are usually multiple responsible persons in any company, all of whom are intended to be snared by the statute's broad net. See Plett v. United States, 185 F.3d 216, 218-19 (4th Cir. 1999). The Court will first apply the foregoing principles to Edmonds.

Edmonds worked for the Company from 1992 to 2000, during which time he acted as senior vice president, executive vice president and CFO. (USA's Statement of Undisputed Facts ("USA Facts"), Ex. 1 (Dep. of Ronald Edmonds ("Edmonds Dep.") at 16-17)) From 1993 to 2000, he also served as a director and the secretary of VisionAmerica. (Edmonds Dep. at 17) According to the Company by-laws, the duties of the CFO were as follows:

> The Chief Financial Officer shall have the general care and custody of the funds and securities of the Corporation, and shall deposit all such funds in the name of the Corporation in such banks, trust companies or other depositories as shall be selected by the Board. He shall receive, and give receipts for, moneys due and payable to the Corporation from any source whatsoever. He shall exercise general supervision over expenditures and disbursements made by officers, agents and employees of the Corporation and the preparation of such records and reports in connection therewith as may be necessary or desirable. He shall, in general, perform all other duties incident to the office of Chief Financial

> Officer and such other duties as from time to time may be assigned to him by the Board.

(USA Facts, Ex. 8 (By-Laws of Omega Health Sys., Inc.[2] (the "By-Laws") at § 4.12)) Edmonds had undisputed authority to open bank accounts and sign checks on behalf of VisionAmerica. (USA Facts, Ex. 4 (Dep. of Andrew Miller, Sr. ("Miller Dep.") at 25 and Ex. 9 at 3); Edmonds Dep. at 30) His name appeared on the signature cards of Company bank accounts. (Edmonds Dep. at 29-31) He, along with Lewis, was authorized to withdraw money from VisionAmerica accounts. (Edmonds Dep. at 30-31; USA Facts, Ex. 7 (Dep. of Tina M. Traster[3] ("Traster Dep.") at 26)) Although it is not disputed that Edmonds possessed the authority to negotiate and sign contracts on behalf of the Company, he insists he only signed contracts the board had approved and directed him to execute. (Edmonds Dep. at 35) In addition, he participated in Company purchases. (Edmonds Dep. at 37) Until his resignation in 2000, Edmonds also signed various Securities and Exchange Commission filings on behalf of VisionAmerica and placed his signature on representation letters required by the Company's auditor, KPMG, certifying that the accounting records presented were complete and accurate to the best of

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[2] Even though the By-Laws are not designated in the body thereof as those of VisionAmerica, the parties refer to them as such in their submissions to the Court. In its motion for summary judgment, the USA advises that VisionAmerica was formerly known as Omega Health Systems, Inc. (USA's Mem. in Supp. of Mot. for Summ. J. at 3 n.1)

[3] According to the pleadings, Traster was a former accounts payable clerk in the Company's accounting department.

his knowledge. (Edmonds Dep. at 39-40; Miller Dep. at 29)

In his deposition, Andrew Miller, Sr., who had served as the Company's chairman of the board and member of the executive and audit committees, stated that Edmonds had the authority to prioritize payments to creditors and explained as follows:

> Q: You said he had relationships with banks. What was his function with the banks?
>
> A: Well, we had both depositary -- depository responsibilities as well as lending responsibilities, relationships with banks. So our -- maintaining our relationship with them in terms of making sure they were aware of the financial position of the company and what was happening and what our lending needs were as well as our banking needs, etc. That would be it.
>
> Q: Well, what was Mr. Edmonds' participation in that?
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> * * *
>
> A: Well, he would call on banks and arrange lines of credit, borrowings, negotiate the terms of those -- that would be it, I would think.

(Miller Dep. at 24-25)

In April 1999, the Company issued a restatement of earnings previously reported for 1998 to the tune of

$1.5 million, resulting from a mistake blamed on Edmonds. The incident led to a realignment of VisionAmerica's accounting department. (Third-Party Def. Ronald Edmonds's Resp. to the United States' Statement of Undisputed Facts, Ex. B (Dep. of Todd Smith ("Smith Dep.") at 116-18); USA Facts, Ex. 2 (Dep. of Bethany Harden[4] ("Harden Dep.") at 18-20)) As a result, Todd Smith was placed in the newly-created position of chief accounting officer and began reporting directly to Lewis. (Harden Dep. at 19-20, Dep. of Thomas Lewis ("Lewis Dep.") at 97) According to Lewis, "the internal accounting of the day-to-day operations of the company were shifted from [Edmonds'] responsibility to Todd Smith's responsibility." (Lewis Dep. at 97) Smith testified in his deposition that after July 1999, when he officially ascended to the position of chief accounting officer, Edmonds was no longer involved in negotiating loans on behalf of VisionAmerica and that, indeed, his authority diminished after that time. (Smith Dep. at 197) It is the contention of Edmonds that a transition period took place between March through July 1999 wherein Smith took on more responsibility in the accounting department. (Edmonds Dep. at 28-29)

According to Miller, however, Edmonds, during his entire tenure at VisionAmerica, "continued to be responsible for the treasury functions, allocation of cash, flow of cash, management of cash." (Miller Dep. at 23) Lewis testified that "while there were some structural changes made . . . to [Edmonds'] responsibilities, none the less, he was retained as chief financial officer." (Lewis Dep. at 97) Board member

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[4] Harden acted as controller for the Company after July 1999

Donald Beisner had a similar recollection, stating in his deposition that from 1998 through 2000 it was Edmonds' duty to direct payment to creditors. (Third-Party Def. Ronald Edmonds's Resp. to United States' Mot. for Summ. J., Ex. H (Dep. of Donald H. Beisner ("Beisner Dep.") at 41) He denied that Edmonds' authority changed from 1998 to 2000, explaining that "[w]hen [the mistake leading to the restatement of earnings] was uncovered, the Board voted to remove him from office and we later found out that he was retained as a consultant because he knew too much about the Company. And, as far as I know, he still had those privileges and duties after March of 2000." (Beisner Dep. at 41) Smith's deposition testimony falls into line with the foregoing. He stated that, after he became chief accounting officer, Edmonds continued as CFO and retained the authority to direct and decline payments to creditors and to manage cash flow. (Smith Dep. at 200-01) He denied signing any checks whatsoever until Edmonds left the Company, which he recalled to be around December 1999.[5] (Smith Dep. at 28)

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[5] Robert Walker, counsel to VisionAmerica, indicated in a report to the Company's board of directors, which is discussed at some length later in this opinion, that "It is significant that Ron and Tom Lewis were the only corporate check signers, and therefore, the other persons [in the accounting department] had no authority to make the [payroll tax] payments. Todd [Smith] did not become a check signer until the first quarter of 2000." (Pl. Lewis' Supplemental Mem. Opposing United States' Mot. for Summ. J. and Cross Mot. and Mem. for Summ. J., Ex. (Dep. of Robert Walker ("Walker Dep.") Ex. 1 thereto (Special Report to the Board of Directors ("Special Report") at 6))

Edmonds has contended that, in his capacity as CFO, he was only responsible for certain aspects of cash flow management, and reiterated that his duties diminished with the appointment of Todd Smith to the position of chief accounting officer. (Edmonds Dep. at 25) In support of his argument that he was not a responsible party during the relevant time period, Edmonds submits that the IRS itself acknowledged that Smith managed the accounting department personnel and was in charge of budgeting, citing the August 2000 IRS Recommendation re: Trust Fund Recovery Penalty Assessment prepared by LaVerne Gentry, the IRS officer assigned to the case. (Third-Party Def. Ronald Edmonds's Resp. to United States' Mot. for Summ. J., Ex. F (Dep. of LaVerne Gentry ("Gentry Dep.") at Ex. 4 p. 3)) Edmonds reference here is a curious one, however, as Gentry's entry on the form concerning Smith stated in its entirety that he "could not direct payment of bills, or negotiate large contracts, loans, or purchases. [Smith] had authority to sign checks but did not. [Smith] managed the accounting dep[artment] personnel and was in charge of budgeting." (Gentry Dep. at Ex. 4 p. 3)

The accounting department, under the supervision of Edmonds, was responsible for payment of payroll taxes. (Edmonds Dep. at 19) He avers, however, that, following the restructuring, the department no longer reported to him. (Edmonds Dep. at 20) It is undisputed that Edmonds had the authority to hire and fire employees of the accounting department prior to the second quarter of 1999. (Edmonds Dep. at 32) It is further undisputed that Edmonds possessed the authority to direct and decline payment to creditors during that period, and was responsible for paying

payroll taxes. (Edmonds Dep. at 27) Again, Edmonds maintains that, after Smith took over the accounting function, decisions as to which creditors were to be paid were made by Smith. (Edmonds Dep. at 64) He acknowledges, however, that he was aware that VisionAmerica failed to pay payroll taxes from the fourth quarter of 1998 through the first quarter of 2000 and that payroll tax deposits were not being made on an ongoing basis. (Edmonds Dep. at 46, 63, 66) He conceded that Beth Porter, former controller of VisionAmerica, came to him with her concerns about the Company's failure to pay the taxes, even as he denied she did not actually report to him at that time, and that he met with her and Smith in November 1999 to discuss the issue. (Edmonds Dep. at 60) He also stated that even after 1999 he was "involved and not dramatically involved" in approving payments to creditors. (Edmonds Dep. at 28)

When asked generally whether notice from the IRS that it might move to seize corporate assets to satisfy a tax liability should be reported to a corporate taxpayer's board of directors, Edmonds replied that "[d]epending upon the materiality, probably yes," but acknowledged that a levy the size of that asserted against the Company should be reported to the board. (Edmonds Dep. at 91-92) He admitted that he made no such report, even though he sat on the board of directors at the time. (Edmonds Dep. at 92) He further conceded that he never told Lewis about the full magnitude of the tax problem. (Edmonds Dep. at 147-48)

In a letter to KPMG, dated November 23, 1999 and signed by Edmonds, Lewis and Smith, the Company represented that it "ha[d] satisfactory title to all owned

assets, and there [were] no liens or encumbrances on such assets nor ha[d] any asset been pledged as collateral." (USA Facts, Ex. 31 ¶ 5) As of the date the letter was issued, Edmonds was aware that the IRS had filed a tax lien against VisionAmerica on October 9, 1999. (Edmonds Dep. at 38, 86-87) In his deposition, Edmonds conceded that the statement was inaccurate, explaining that "[t]hese documents are a kind of boiler plate documents. They're probably viewed less that way today than then, but they're often given to you late in the game, you know, here sign this, and you quickly read them . . ." (Edmonds Dep. at 130)

Edmonds also admits that he received "many" notices from the IRS of payroll tax delinquencies and of federal tax liens and levies. He related that he put the notices in a file and did not "take them to the person whose responsibility it was to ensure that the payroll taxes were being paid." He claimed to not know why he failed to do so. (Edmonds Dep. at 86-87) Edmonds conceded that, from the fourth quarter of 1998 to the first quarter of 2000, he was aware that payments were being made to some creditors instead of the IRS. (Edmonds Dep. at 55) According to Harden, Edmonds made the decision to pay other creditors and not the IRS. (Harden Dep. at 95) It is Edmonds' position that Smith made the decisions as to which creditors would receive payment. (Edmonds Dep. at 64)

Edmonds stated in his deposition that "[d]ealing with the fact of the delinquency was a responsibility that [he] assumed" and that he "was trying to take care of it." (Edmonds Dep. at 62) Although after the reorganization of the Company in May 1999, Edmonds considered it his responsibility to "figure out how to

get rid of the delinquency," payment of the employment taxes was no longer his direct responsibility. (Edmonds Dep. at 77-78, 97) It is undisputed that Edmonds made payments to decrease the delinquency. (Edmonds Dep. at 12) On August 5, 1999, he met with an IRS officer and submitted to him a check for $50,000. He later made payments to the IRS in the amounts of $250,000 and $216,000. (Edmonds Dep. at 73-75) Edmonds also had discussions with the IRS concerning ways to improve cash flow and generate cash by selling assets in order that the payroll taxes could be paid.[6] (Edmonds Dep. at 55) While he "[w]orked as hard as he could on tile issues that were causing the cash flow . . . crunch," Edmonds did not "go to the people responsible for processing payroll and say start making payments," ostensibly because the accounting department no longer reported to him, but to Smith. (Edmonds Dep. at 81-82)

Edmonds admits he did not direct Gentry to discuss the tax issue with any other employee of VisionAmerica, but argues simply that there is no evidence to establish that he was the person responsible for *all* contacts with the IRS. (Edmonds Dep. at 84) However, in an IRS form completed by Gentry in December 1999 in connection with a "responsible officer interview," Gentry indicated that Edmonds was the only representative of the Company who "handled IRS contacts, such as IRS

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[6] The USA avers that Edmonds told the IRS VisionAmerica would begin making timely tax deposits, citing Edmonds' deposition at page 80. Edmonds argues that there is no evidence to support such an assertion. As the USA has failed to attach page 80 to its motion for summary judgment, the Court is unable to consider it.

correspondence, phone calls from IRS, or visits by IRS personnel." (USA Facts, Ex. 9, Form 4180 Report of Interview with Individual Relative to Trust Fund Recovery Penalty at 6) On page 8 of the form, Edmonds affixed his signature thereto, declaring that he had "examined the information given in this statement and, to the best of [his] knowledge and belief, it [was] true, correct and complete." (USA Facts, Ex. 9, Form 4180 Report of Interview with Individual Relative to Trust Fund Recovery Penalty at 8) In the "Additional Comments" section of the form, Edmonds hand wrote the following: "The delinquency arose under my supervision and I am the person responsible. I am taking aggressive action to see that the delinquency is eliminated, as I have discussed with the Agent." (USA Facts, Ex. 9, Form 4180 Report of Interview with Individual Relative to Trust Fund Recovery Penalty at 8)

In his response to the motion for summary judgment, Edmonds argues that the statement said nothing about who was actually authorizing payments to creditors from the second quarter of 1999 until his resignation in 2000 or about his actual authority to direct payments to creditors after Smith took over the accounting department. He also insists that the USA has not demonstrated that he was aware of *all* RS correspondence with the Company.

Edmonds does not challenge his status as a "responsible person" at VisionAmerica through the first quarter of 1999, but argues that he could no longer be categorized as such after the corporate reorganization in the spring of 1999, when he was "cut out of the loop." Viewing the evidence in the light most favorable to Edmonds, however, the Court finds that

he has failed to show that he was not a "responsible person" who "willfully" failed to collect or pay over the employment taxes. As for the responsible person factor, the Court's conclusion rests not on the form of Edmonds' employment at VisionAmerica, but on the substance thereof. Even after Todd Smith was hired as the chief accounting officer and duties were reassigned in the spring of 1999, Edmonds continued to serve as CFO of the Company, retained the ability to sign checks on behalf of VisionAmerica, and remained actively involved in determining payments to creditors. Indeed, he appears to have jealously guarded his role in controlling the disbursement of funds, exhibited in part by Porter's reliance on his counsel, instead of Smith's, to deal with the unpaid taxes. The fact that he may not have been alone in that endeavor, but shared some activities with others, including Smith, or was less involved than he had been previously, does not absolve him of responsibility. As the Court has indicated herein, "[h]aving significant control does not mean having *exclusive* control over the disbursal of funds or the final say over whether taxes or bills are paid." Thomas v. United States, 41 F.3d 1109, 1113 (3d Cir. 1994) (emphasis added); see also Gephart, 818 F.2d at 473. Moreover, "Section 6672 does not confine liability for the unpaid taxes only to the single officer with the greatest or the closest control or authority over corporate affairs." Gephart, 818 F.2d at 476. Edmonds' frequent arguments that he was "stripped of authority" after May 1999 are not, in the Court's view, supported by the evidence, including his own deposition testimony and admissions to the IRS. Instead, the evidence, aside from Edmonds' self-serving assertions to the contrary, indicates that, even if he no longer managed the day to day operations of the accounting department after the spring or

summer of 1999, he continued to exert control over the Company's major financial decisions. See United States v. Mitchell, 82F.App'x 781, 785 (3d Cir. 2003) (corporation's president a "responsible person" even though he had previously resigned, as he remained involved in the management of the corporation after his "resignation" date and his own testimony reflected a level of familiarity with the corporation's financial affairs after his "resignation" that could have only come from his continued involvement in the corporation's most important decisions).

Having found that Edmonds was a "responsible person" under § 6672(a), the Court further determines that he willfully failed to collect or pay the employment taxes owed. He has acknowledged that he was aware of the Company's failure to pay the taxes and of its payment of funds to other creditors. Such knowledge in the hands of a responsible person is sufficient to trigger liability. See Bell, 355 F.3d at 393.

The Court now turns its attention to Lewis, CEO and president of VisionAmerica from the fourth quarter of 1998 until the first quarter of 2000. (Lewis Dep. at 10; USA Facts, Ex. 9; Resp. of Thomas P. Lewis to the USA's First Set of Admissions at ¶¶ 2-3.) According to the Company's by-laws, the CEO's duties were as follows:

> The Chief Executive Officer of the Corporation shall, subject to the control of the Board, in general supervise and control all of the business and affairs of the Corporation. He may sign, with or without the Secretary or any other proper officer of the Corporation, certificates for shares of the Corporation, any deeds,

> mortgages, bonds, contracts or other instruments which the Board has authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the Board or these By-laws to some other officer or agent of the Corporation, or shall be required by law to be otherwise signed or executed and, in general, perform all duties incident to the office of Chief Executive Officer and such other duties as may be prescribed by the Board from time to time. In the absence of the Chairman, the Chief Executive Officer shall perform the duties of the Chairman.

(By-Laws at 4.8)

Miller described Lewis' duties thusly:

> Q: . . . [W]as he [(Lewis)] responsible for all business activities of the business?
>
> A: He was responsible to supervise and control, yes.
>
> Q: Would that include making sure the corporation paid its payroll taxes?
>
> A: I assume so.
>
> Q: Mr. Miller, under the position of CEO, did Mr. Lewis have the authority to sign contracts, deeds, mortgages, and other instruments?
>
> A: Yes.

Q: Okay. As chief executive officer did Mr. Lewis have the authority to hire and fire employees?

A: Yes.

Q: There's kind of an amorphous clause in [§ 4.8 of the by-laws] that says other authority delegated to him by the board. Do you have any understanding of what authority was delegated to him?

A: I don't recall any specific authorities that the board delegated to him.

Q: Would you described Mr. Lewis's powers as broad?

A: Yes.

Q: Did Mr. Lewis have the authority to sign checks on behalf of VisionAmerica?

A: Yes, to my understanding.

Q: Likewise would he have the authority to direct payment to the creditors of VisionAmerica?

A: That would be my understanding.

Q: Okay. What type of financial control did Mr. Lewis have over the corporation?

* * *

A: He was -- well, every employee in the company reported to him directly or indirectly as is typical for a CEO of any corporation. In terms of the business model, he made changes in that from time to time. Generally those things would be discussed, if not, indeed, approved at the board level.

Q: Okay. You said all the employees reported to him either directly or indirectly. Did I understand you correctly?

A: Yes.

Q: Okay. Would that also include the CFO, Ron Edmonds, of the corporation?

A: Yes. But I do remember at some point in time there was discussion about changing Ron's reporting relationship to report directly to the board of directors. . . . Now, when that happened and how long that lasted, whatever, it in essence made no difference in the day-to-day functioning of the business as best I could determine.

Q: So in the day-to-day functioning of the business would the CFO still report to the CEO?

A: Yes.

Q: I believe there was some point in time where the business model was amended to be more like the ICON business model. Does that ring any bells with you?

A: Yes.

Q: Okay. Who suggested that amendment?

A: Tom.

Q: Okay. And what did that entail?

A: That was a radical departure from our initial business model for providing Lasix vision correction surgery to patients. It involved a joint venture with ICON, a company out of Canada. It involved a change from a full price fee for service approach to a radically discounted model with heavy advertising. That's about the best 1 could characterize it.

Q: Okay. And Mr. Lewis is the one that suggested and implemented this change?

A: Yes.

Q: Okay. What was Mr. Lewis's authority concerning mergers and acquisitions?

A: It required board approval. . . . But he initiated all the actions and brought them to the board for a sign-off after everything was worked out.

Q: When you say "worked out" --

A: All the details with the -- identifying the prospective practice to be acquired, negotiating with the physician who owned the practice, determining the price to be

paid, etc. All those details were worked out. It was then presented to either the executive committee in the absence of the board or the full board.

Q: At that point in time would Mr. Lewis also enter into I think they're called letters of intent?

A: Uh-huh.

Q: Would that be done?

A: I don't recall whether he did letters of intent which were subject to board approval -- . . . before or after board or executive committee approval. I don't recall.

Q: Okay. But he had the authority to go target acquisitions and negotiate contracts.

A: Right.

* * *

Q: . . . In your opinion what amount of authority did Mr. Lewis have over the operations of VisionAmerica?

* * *

A: As CEO he had comprehensive authority to hire and fire and direct the day-to-day affairs of the company. The responsibilities for board approval were limited to mergers and acquisitions, compensation for top

> executives, selection of auditors, you know, certain very specific areas that required board approval of actions.

(Miller Dep. at 17-22) According to Edmonds, prior to the changes made in 1999, he reported as an employee to Lewis and as a director to the board. (Edmonds Dep. at 23) Lewis stated in his deposition that the CEO reported to the board of directors. (Lewis Dep. at 26) Miller recalled that the decision was made at some point to have Edmonds report directly to the board, as he appeared to be intimidated by Lewis. (Miller Dep. at 88)

Miller also related that both Lewis and Edmonds had the authority to open bank accounts on behalf of the Company. (Miller Dep. at 25-26.) Lewis does not deny he possessed check-signing authority on behalf of the Company, but stated in his deposition that

> . . . I just so rarely signed checks that I don't know that I ever signed a check that didn't have at least Ron's verbal approval before I signed it. We just didn't do it that way. I did an inventory in '99 with the help of one of the accounting staff people before I left, and, of the approximate 40,000 checks that were signed that year, we could not find any that I had signed, and my guesstimate as to how many I did sign that year would have been -- I would have guessed less than ten. So it was just so rare. The in-house procedures that the accounting department had for documenting check requests and signing them, they could be changing the forms or however they decided to do it internally, and I would never know.

(Lewis Dep. at 19,43-44) He further denied having the authority to withdraw funds from Company bank accounts, citing only to Section 4.12 of the By-Laws, which provided that the CFO was to supervise expenditures and disbursements. Lewis admitted, however, that his name appeared on the signature cards for VisionAmerica's bank accounts. While Lewis does not deny he had the ability to hire and fire certain employees of VisionAmerica, he denied specifically having had the ability to fire the CFO. He also denied having the authority to direct or decline payment to creditors based on the By-Laws' assignment of that task to the CFO. Although that may have been true, the deposition testimony of Miller reflects that the ultimate responsibility for payment to creditors rested with the CEO. (Miller Dep. at 27) In addition, Lewis' statement in his response to the motion for summary judgment that the deposition of Smith indicates Edmonds had the *sole* responsibility to make payroll tax payments is a slight mischaracterization. The testimony referred to by Lewis merely reflects that the responsibility was Edmonds', not that no one else in the Company carried any responsibility for the payments. Lewis also argues in his response that he was "so removed from the bill-paying end of the business that Todd Smith even acknowledged that if Lewis had instructed him to pay one creditor and Edmonds had instructed him to pay another creditor, he would not have automatically obeyed Lewis, the senior executive, but would have paid neither creditor until the matter got resolved." The page of Smith's deposition upon which the contention is based actually tells a somewhat different tale, stating in its entirety as follows:

Q: . . . did Mr. Lewis have ultimate authority over the affairs of the company to the extent that the board didn't have authority?

A: I do not know for sure. I do not know.

Q: Mr. -- if during the time you were chief accounting officer and before Mr. Edmonds left, if Mr. Lewis told you to pay Vendor A and Mr. Edmonds told you to pay Vendor B and there was only enough money to pay Vendor A or B, who would you pay?

A: Well, that situation never happened, so I can't answer that. But it would be a tough decision. And I doubt, I doubt I would pay it with the two of them disagreeing.

Q: Good answer.

A: Try to reach a resolution.

Q: But you don't have any doubt that Mr. Lewis had at least equal, if not greater, authority to prioritize creditors than Mr. Edmonds did, do you?

A: Authority? Sure.

Q: Equal or greater?

A: Yeah.

(Smith Dep. at 167)

It is undisputed that Lewis placed his signature on the representation letters required by auditor KPMG, which, as previously indicated, were also signed by Edmonds. (Miller Dep. at 29) In her deposition, Porter testified that in early 1996 she received from Lori Jennings, Lewis' secretary, a document from the IRS with a handwritten note in the corner from Jennings which read "Beth, Tom asked if you could respond to this." (USA Facts, Ex. 5 (Dep. of Beth Porter ("Porter Dep.") at 63-66) Porter later returned the document to Jennings with a handwritten note of her own, a copy of which is attached to the USA's motion for summary judgment. The note reads as follows:

> Tom --
>
> Yes, 4th quarter 941 taxes have not been paid in full. Cash is tight and Ron [Edmonds] has been assuring me we will soon catch up. I am not sure that I agree with the amount due on this notice as $52,118.74 was paid 1/3/96 -- We are <u>not</u> current for 1st qtr. 1996.

(USA Facts, Ex. 14) She could not recall whether she at any point gave the letter to Edmonds. (Porter Dep. at 63-67) Nor did she speak directly with Lewis. (Porter Dep. at 36) The Government also contends that Lewis knew of the Company's failure to pay taxes in 1998, based on the following deposition testimony of Harden:

> A: Yes. I believe [Tom Lewis] was aware [that there were unpaid payroll taxes] in 1998. Yes.
>
> Q: Okay. Why do you now say that?

A: I did not have any one-on-one discussions in 1998 with Tom. But it was not something that I felt was an issue that was unknown to him when I became aware of it, that it was known by Tom and Ron that we were behind in that.

(Harden Dep. at 137-38) In his response to the dispositive motion, Lewis dismisses Harden's comments as mere speculation. She testified further with respect to a November 4, 1999 meeting thusly:

Q: . . . Now, with regard to the third quarter financial meeting, we've seen documentation today, and you've provided documentation that the IRS issued, that is, the issue with regard to unpaid payroll taxes was raised; correct?

A: Correct.

Q: And it's included in the documentation prepared for that meeting?

A: Yes.

Q: Did Mr. Lewis register any surprise when that issue was raised at that meeting?

A: I don't -- I do no believe so.

Q: Did you get the impression that Mr. Lewis previously had some knowledge of familiarity that there was some issue with regard to unpaid payroll taxes?

A: Yes.

(Harden Dep. at 198-99) According to Edmonds, the meeting was attended by himself, Lewis, Smith and Harden. (Edmonds Dep. at 61) A list was prepared with issues to be discussed at the meeting. (Harden Dep. at 32) The "IRS Notices" reference on the list stated as follows:

> We have received two notices from the IRS over the last month. The notices are for liens due to unpaid payroll taxes in prior years Large payables amount in our vendor GL to the IRS

(USA Facts, Ex. 15) Edmonds recalled that, while unpaid payroll taxes were one of the issues to be dealt with, "[t]here was not a great deal of discussion specific to payroll taxes" at the meeting, (Edmonds Dep. at 61) Apparently, VisionAmerica had been notified by its bank shortly before the meeting that its account had been levied by the IRS. (Harden Dep. at 71-72) Harden remembered being concerned enough about the levy to bring it up at the meeting and make sure everyone in attendance, including Lewis, was aware of it. (Harden Dep. at 74) She further stated that, at the meeting, Edmonds said that he was talking with the IRS and that he would take care of the problem, to which Lewis consented. (Harden Dep. at 76) Following the November 4 meeting, Lewis instructed Edmonds and Harden to resolve the matter. (Edmonds Dep. at 61-62)

In letters dated November 19, 1999, the IRS notified Edmonds, Lewis, Smith and Harden that they may be held personally liable for the payroll tax delinquency. Although he admitted receiving the

letter, Lewis was "unsure" of its contents because Edmonds immediately confiscated it, stating that he was meeting with the IRS. (USA Facts, Ex. 12 (Resp. of Thomas Lewis to the USA's First Set of Reqs. for Adm. at No. 14.) In his response to the motion for summary judgment, Lewis argues that "[i]t is not even clear that [he] read the letter. . . before Edmonds physically took" it.

Upon receipt of the notices, the four met again specifically to discuss the tax issue. Harden offered the following version of the events surrounding the second meeting:

> A: We [Harden and Smith] at that point both went and discussed it with Ron Edmonds and said, look what we got in the mail, and we asked what was going on. remember him taking the letters from me and saying -- my telling him that they've scheduled appointments for us. He took our letters and said he would call and take care of it, not to worry about it, that we wouldn't have to go meet with them, that everything would be okay. After leaving his office, Todd and I then did go and talk with Tom about this and said, we've just got letters in the mail about this, and he said, I'm surprised -- I think he was surprised, too, that we got the letters, and he checked his mail. I think Lori, his assistant, checked his mail. And he had a letter as well. So we had all gotten letters that day.
>
> Q: Did you discuss with Mr. Lewis what the letters were about?

A: Yes, that Ron had said he would take care of it, and at that time Todd and Tom and I discussed the fact that this was what we had just discussed in the quarterly meeting, the stuff that I printed out with the November 4th date, that this is what I had been asking about or raised a concern about in those meetings. That was when Tom said, well, didn't Ron say he would take care of this? Let's bring him in. And Ron came in, said he was going to be calling, like he had told us, and not to worry, and that he may get KPMG involved in it as well to help out, the tax department.

Q: When you were in the office with Mr. Lewis discussing this, did you specifically discuss payroll taxes?

A: Yes.

* * *

A: . . . we talked about the fact that these were unpaid payroll taxes. I had said do you remember we had the meeting for the third quarter 10-Q and that these were the unpaid payroll taxes that we had discussed then that we had gotten levies on in our account and now we're getting letters? I was getting more and more concerned that things weren't being dealt with or something wasn't being done correctly because things kept escalating, it seemed to me.

(Harden Dep. at 79-82) Similarly, Smith related that

> Tom called Ron down to his office and said, you know, what's going on with these (letters from the IRS). And Ron, you know, said, you know, this is just part of their process. I am handling this. And he went -- Ron took our notices from us and said that he was working with the IRS and said he was going to be getting -- probably going to be getting KPMG involved to help us, because we were behind.

(Smith Dep. at 48-49) With respect to the content of the meeting, Smith stated as follows:

> Q: After you received this letter and you were talking with Mr. Lewis and Ms. Harden, did you ever explain to Mr. Lewis what type of tax was at issue?
>
> A: Yes. I mean, we definitely talked about payroll taxes. And, again, it wasn't the first time we'd talked about them. So, this was not, you know, this wasn't new news, because we had had the meeting, you know, sometime before that or weeks or, you know, a month or whatever before that where we had listed our payroll-tax liability as an issue on this list that was reviewed by Tom.

(Smith Dep. at 50) Smith also gave the following testimony:

> Q: Concerning the payroll-tax issue, did Mr. Lewis at any point in time express to you that he thought Ron was lying to him?
>
> A: No. Not that I know. Not that I remember.

Q: After this issue blew up, did you ever discuss it with Mr. Lewis about what happened?

* * *

A: . . . I do remember one particular time when I was in Tom's office and he, and he asked me to really think hard about what, you know, about this meeting where we had talked about the payroll taxes and whether we had really discussed it as being payroll taxes, because he never -- he claimed that he never really realized that. And he didn't mean to put words into my mouth but wanted me to really think about that. And so, I told him, you know, there was no, no need to be concerned about putting words in my mouth, that I was very clear in my memory of what we talked about, you know, that we had laid all that out.

Q: I'm sorry. You were clear that you had discussed payroll taxes?

A: Yes.

(Smith Dep. at 84-85) This was not the first time Lewis may have questioned Edmonds' credibility. At the time of the 1998 restatement of VisionAmerica's financial statements due to Edmonds' accounting error, it was Lewis' position that Edmonds' credibility had been "compromised" and that he should be replaced.

With respect to the November 19 meeting, Lewis, in his response to the motion, argues that "[a] meeting

did take place on November 19,1999 regarding the IRS letters, but the tax problem was never described as a payroll tax problem. Edmonds never identified the problem as a payroll tax problem. Rather, he again explained that it was a paperwork problem and that he would engage KPMG for help."

The following is the IRS's timeline in this case. On September 20, 1999, the IRS forwarded a request to VisionAmerica that it pay approximately $1.5 million in payroll taxes for the second quarter of 1999. (USA Facts, Ex. 18) The agency sent a notice of federal tax lien to VisionAmerica on October 9, 1999 informing it that the Government had filed a tax lien in the amount of approximately $2.7 million for the fourth quarter of 1998 and the first quarter of 1999. (USA Facts, Ex. 19) On October 25, 1999, a notice of intent to levy approximately $1.5 million for the second quarter of 1999 was sent to the Company by the IRS. (USA Facts, Ex. 20) Union Planters Bank notified VisionAmerica on November 2, 1999 that the IRS had levied its bank accounts in the amount of approximately $150,000. (USA Facts, Ex. 21) A final notice of intent to levy $1.62 million was issued by the IRS on November 17, 1999. (USA Facts, Ex. 22) On November 29, 1999, VisionAmerica was noticed by the IRS that approximately $1.4 million was due for the third quarter of 1999. (USA Facts, Ex. 23) On December 23, the IRS levied the Company's bank account in the amount of $201,000. (USA Facts, Ex. 24)

It is undisputed that both Lewis and Edmonds were informed of the December 23 levy. According to Smith, Lewis' reaction to the levies was to discuss the matter with Edmonds to ensure that it was being handled and to question why the accounts were

continuing to be levied. (Smith Dep. at 148) In his response to the motion, Lewis acknowledges that he raised the tax issue with Edmonds but asserted that "he still did not know it was a payroll tax problem. When [he] asked Edmonds for an explanation, he was told to not worry, that the issue was the same tax issue as described before, and that the corporation would get a refund. Edmonds said that the IRS problem was an IRS error about different subsidiaries' underpayments and overpayments, and that the corporation was actually entitled to a refund."

On March 6, 2000, the IRS issued a final notice of its intent to levy $3.3 million for payroll taxes for the second and third quarters of 1999. (USA Facts, Ex. 25) VisionAmerica was advised on March 13, 2000 by Union Planters Bank that the IRS had levied its account and that a hold had been placed on the $506,000 contained therein. (USA Facts, Ex. 26) In his response, Lewis maintains that directors Miller and Beisner knew about the payroll tax problem as early as March 10, 2000, while Lewis was vacationing abroad, and that neither contacted anyone, including Edmonds, to address the issue; initiated an internal investigation or left a message for Lewis. In support of his contention, Lewis cite the depositions of Beisner and Miller. However, a review of the pages indicated by the Plaintiff completely fail to back up his claims. Indeed, at the cited page in his deposition, Miller testified that, upon receiving information from Beisner that VisionAmerica was delinquent on its payroll taxes, he "called Ron Edmonds to find out about it, to find out if it was true and what the magnitude and extent, etc., was. And, as I say, it was three and a half, four hours before Ron called me back. And I subsequently determined that he and Tom had been

meeting to discuss what to do about this issue." (Miller Dep. at 84)

Lewis was terminated because, according to Miller, the failure to pay the employment taxes occurred while he was CEO and president of the Company (Miller Dep. at 52), explaining that "therefore, a certain responsibility was on his shoulders." He further stated that "[t]he company believed that the president and CEO of the company was responsible for making certain that payroll taxes were paid and, given the order of magnitude of the shortfall, that he should have been aware of it." (Miller Dep. at 52) Lewis takes issue with Miller's recollection, pointing to his own deposition testimony in which he related simply that he resigned without being asked to do so. (Lewis Dep. at 118)

Finally, according to the Government, VisionAmerica paid other creditors while failing to pay payroll taxes due. It offers the following facts in support of its argument, all of which are denied by Lewis. In November 1999, the Company generated approximately $6.8 million in cash receipts, paid some $6.7 million to creditors, and retained on hand about $3.2 million in cash at the end of that month. Pursuant to its financial statement for the first quarter of 2000, VisionAmerica had cash receipts of $13.2 million, with $12.2 million in operating expenses and $2 million in corporate expenses. None of the disbursements during that period, the USA contends, were made to the Government. VisionAmerica's bank statement for February 2000, along with copies of checks for that time frame signed by Edmonds, reflect $2.8 million in credits and $2.5 in debits with an ending balance of $386,133.33 in cash. The March 2000 statement and

corresponding checks, again signed by Edmonds, show $3.7 million in credits and $3.4 million in debits with an ending balance of $657,909.25.

Viewing the evidence in the light most favorable to Lewis, the Court finds that he has failed to overcome the presumption of correctness in the Government's assessment. He was the CEO, president and a board member of the Company; under the By-Laws, he was to "in general supervise and control all of the business and affairs of the Corporation"; and he could sign checks on behalf of VisionAmerica and hire and fire its employees. The fact that he delegated the tax problem to Edmonds does not wipe the slate clean as far as Lewis is concerned. As the Sixth Circuit articulated in Kinnie, "one who possesses significant control over the company's financial affairs may not escape liability by delegating the task of paying over the taxes to someone else." Kinnie, 994 F.2d at 284. Thus, the Court finds that Lewis was a "responsible person" for purposes of § 6672(a). See Harold v. United States, No. 1:04CV01281, 2005 WL 1719126, at *4 (N.D. Ohio July 22, 2005) (store manager was "responsible person" where he was responsible for overall operations, hired and fired employees, had check writing authority, and had knowledge of the status of monies owed and paid).

The Court further finds that Lewis' failure to see that the taxes were paid was willful. As CEO and president, it is clear that he was aware of the financial strains on the Company. Despite his protestations and self-serving contentions, it is obvious from the deposition testimony of other employees of VisionAmerica that he was informed by these concerned subordinates on more than one occasion that the payroll taxes were not being paid. His

apparent choice to turn a blind eye and a deaf ear to these warnings, while shifting the blame to Edmonds, cannot save him from liability. -- See Harold, 2005 WL 1719126, at *5 (taxpayer acted willfully and with reckless disregard where, even though he may have lacked actual knowledge of nonpayment, he was aware of tax problems and the receipt of notices from the IRS, but assumed matters were being taken care of and did nothing to investigate).

In an attempt to bolster his assertion that he was in fact unaware of the delinquency, Lewis has submitted days prior to trial a supplement to his response to the dispositive motion based on the deposition of Robert Walker. Walker, former general counsel and security attorney for VisionAmerica, was appointed by the Company's audit committee to investigate the circumstances surrounding the unpaid taxes. In his deposition, he recalled that he first learned of the problem from Edmonds while the two lunched with Lewis on March 17,2000. (Walker Dep. at 37-40) At the time, Walker remembered thinking that Lewis "seemed genuinely surprised" by the revelation. (Walker Dep. at 40) During his exit interview five days later, Edmonds advised Walker that he had not told Lewis about the taxes until it came out in the lunchtime conversation. (Special Report at 6) Based on Walker's testimony, Lewis maintains that, since he did not know of the delinquency until the mid-March 2000 lunch and resigned shortly thereafter, he would not have had the opportunity or ability to see that the taxes were paid.

A review of Walker's deposition reveals that Lewis' supplemental filing does far more to seal his fate in this matter than promote his cause. The Special

Report prepared by Walker's law firm at the request of the committee, whose members included Beisner and Miller, is particularly damning to Lewis. Walker described Lewis' role in the tax debacle as follows:

> . . . Taken in the most favorable light, Tom was unaware of this IRS issue until late November, 1999, and even at that time he was not aware that it was a payroll tax issue nor was he aware of the magnitude of it. He relied on Ron and did not follow up. Even in the most favorable light, however, there were by then numerous warning signs, including two IRS levies on the bank account and IRS notices to individual Company officers of problems. These types of things warranted an immediate and detailed investigation into what really was happening. It is uncontroverted that there was no follow up by Tom. Taken in the worst light, it could be inferred that from late November 1999, Tom was aware of this issue and failed to disclose this information to the board. . . .
>
> Based on all the information, the demeanor of the people when they gave me statements, and my general knowledge of the situation, I don't believe that Tom intentionally withheld this information from the Board or the banks or outside auditors. I do believe that during the fourth quarter of 1999, Tom knew about the cash flow shortages generally, that he was becoming more and more concerned about the Company's direction, and that he disregarded the warning signs around him by not following up on matters that were unusual and seemed to be a problem for the Company. After knowing of

> an IRS levy on the Company's bank account and shortly afterwards receiving a personal notice from the IRS of potential individual liability in connection with payroll tax penalties, some action and diligence was dictated.
>
> . . . I believe that [Lewis'] reliance on Ron and his failure to follow up were not reasonable or prudent.

(Special Report at 6-8) If anything, the Special Report confirms the Court's conclusion that Lewis had, at worst, actual knowledge that the taxes were going unpaid or, at best, a reckless disregard of facts and known risks that such was the case. See Valleau, 1998 WL 939840, at *2.

CONCLUSION

Based on the foregoing, the motion of the United States for summary judgment is GRANTED and the cross-motion of the Plaintiff is DENIED. Consequently, all remaining pending motions in this matter are DENIED as moot and the pretrial conference and trial are to be removed from the Court calendar. The Clerk is hereby directed to enter judgment for the United States.

IT IS SO ORDERED this 12th day of September, 2005.

/s/
J. DANIEL BREEN
STATES DISTRICT JUDGE

This document entered on the docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 9/12/05

* * *

[Notice of Distribution Omitted in Printing of this Appendix]

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 06-5957/5959/5721/5724/5725/5726

[Filed September 22, 2009]

THOMAS P. LEWIS,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA, (Internal Revenue Service)	)
	)
Defendant/Third-Party Plaintiff-Appellee.	)
	)
RONALD EDMONDS,	)
	)
Third-Party Defendant.	)
	)

ORDER

BEFORE: CLAY and ROGERS, Circuit Judges; and JORDAN,* District Judge.

The court having received two petitions for rehearing en banc, which were circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

---

* Hon. Robert Leon Jordan, Senior United States District Judge for the Eastern District of Tennessee, siting by designation.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

Case No. 02-2958

[Filed June 10, 2008]

THOMAS P. LEWIS,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES,	)
	)
Defendant/Third-Party Plaintiff,	)
	)
v.	)
	)
RONALD L. EDMONDS,	)
	)
Third-Party Defendant.	)
	)

AMENDED NOTICE OF APPEAL AND CONDITIONAL APPEAL BY PLAINTIFF LEWIS

Notice is hereby given that Plaintiff Lewis appeals to the United States Court of Appeals for the Sixth Circuit from the decisions of this Court, as follows:

1. Plaintiff Lewis appeals the Court's April 23, 2008 order that the Court's September 13, 2005 judgment be altered or amended under Rule 60(a) of the Federal Rules of Civil Procedure to add a damage award owed to the United States. Plaintiff disputes that the absence of a damage award in this case is correctable as a clerical error under Rule 60(a). Plaintiff Lewis also appeals the Amended Judgment in a Civil Case filed on May 28, 2008.

2. In the event the Sixth Circuit does not reverse or remand the Court's April 23, 2008 order and May 28, 2008 Amended Judgment as described above, Plaintiff Lewis conditionally appeals the Court's September 13, 2005 final judgment in favor of the United States holding him liable for the trust fund penalty tax.

DATED: June 10, 2008

Respectfully submitted,

The Cavitch Law Firm, PLC

By: /s/ Matthew P. Cavitch
Matthew P. Cavitch
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Attorney for the Plaintiff
Thomas P. Lewis

* * *

[Certificate of Service Omitted in Printing of this Appendix]

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT CIVIL APPEAL STATEMENT OF PARTIES AND ISSUES

Case No: **08-5726** Case Manager: **Julie Brock**

Case Name: **Thomas Lewis v. USA**

Is this case a cross appeal? ☐ Yes ☑No

Has this case or a related one been before this court previously? ☑ Yes ☐ No

If yes, state:
Case Name: **Thomas P. Lewis v. USA**
Citation: **Case No. 06-5957**
Was that case mediated through the court's program? ☐ Yes ☑ No

Please Identify the Parties Against Whom this Appeal is Being Taken and the Specific Issues You Propose to Raise:

On 9/13/05, the District Court granted summary judgment for the USA, holding that Appellant Lewis was a responsible person liable for the trust fund penalty tax. However, the Summary Judgment did not include a damage award.

On 4/23/08, the District Court ruled that it could add a damage award as a correction of a clerical error under FRCP 60(a). The District Court's Amended Judgment was filed on 5/28/08.

Appellant Lewis appeals the Court's 4/23/08 order that the Court's 9/13/05 judgment be altered or amended under FRCP 60(a) to add a damage award owed to the USA. Appeallant disputes that the absence of a damage award in this case is correctable as a clerical error under Rule 60(a). Accordingly, Appellant Lewis also appeals the Amended Judgment filed on 5/28/08. This issue on appeal is purely a question of civil prcedure.

In the event the Sixth Circuit does not reverse or remand the District Court's 4/23/08 order and 5/28/08 Amended Judgment as described above, Appellant Lewis conditionally appeals the District Court's 9/13/05 final judgmnet in favor of the USA holding him liable for the trust fund penalty tax. This issue on conditional appeal is a tax question and was the subject of the appeal assigned Case No. 06-5957.

This is to certify that a copy of this statement was served on opposing counsel of record this 20th day of June, 2008.

/s/ Matthew P. Cavitch
Name of Counsel for Appellant